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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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PAUL CASPARI and WILLIAM L. WEBSTER

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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# QUESTIONS PRESENTED

## I.

WHETHER A HABEAS CORPUS APPLICANT MAY REQUEST THE RETROACTIVE APPLICATION OF NEW LAW UNDER THE DOUBLE JEOPARDY CLAUSE UNDER A THEORY THAT THE NEW RULE WOULD DEPRIVE THE GOVERNMENT OF THE POWER TO PUNISHMENT.

## II.

WHETHER THE DOUBLE JEOPARDY CLAUSE PROHIBITS A SECOND TRIAL FOR CONDUCT WHERE EVIDENCE OF THAT CONDUCT WAS ADMITTED AT AN EARLIER TRIAL, BUT THE GOVERNMENT HAD NO BURDEN TO PRESENT EVIDENCE OF THAT CONDUCT OR TO PROVE THAT CONDUCT BEYOND A REASONABLE DOUBT, AND WHERE THE STATE PROPOSES TO ADMIT EVIDENCE OF CONDUCT THAT WAS PROVED BEYOND A REASONABLE DOUBT AT AN EARLIER TRIAL, BUT WHICH THE GOVERNMENT HAS NO BURDEN TO PRESENT EVIDENCE OF THAT CONDUCT OR TO PROVE THAT CONDUCT BEYOND A REASONABLE DOUBT AT A SECOND TRIAL.

III.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN GRADY V. CORBIN.

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IN THE

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OCTOBER TERM, 1991

PAUL CASPARI and WILLIAM L. WEBSTER,

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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## OPINIONS BELOW

The panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 938 F.2d 899 (8th Cir. 1991) and is published in the Appendix at A-1. The order sustaining and adopting the

Magistrate's Report and Recommendation is not reported, but is included in the Appendix (A-66). The Magistrate's Report and Recommendation is not published, but is included in the Appendix (A-47). The earlier orders of the district court and the Magistrate are also unpublished, but are included in the Appendix (A-34, A-40, A-42).

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on July 15, 1991. The petition for rehearing or rehearing en banc was denied by the Court on August 30, 1991, as amended on September 4, 1991 (A-89). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 13.1, the present petition for writ of certiorari was required to be filed by petitioners[1] within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Petitioner Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, is the successor in office to Myrna Trickey, former superintendent of the Missouri Eastern Correctional Center, and is respondent's curent custodian. Under 28 U.S.C. § 2254, Rule 2(a), and Supreme Court Rule 35.03, Paul Casari is a proper petitioner before this Court. Since the sentence respondent challenged was a sentence to be served in the future, Misouri Attorney General William L. Webster is also a proper petitioner before this Court. 28 U.S.C. § 2254, Rule 2(b); Supreme Court Rule 14.1(b).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Respondent was found guilty by a jury of stealing a motor vehicle and was sentenced by the court as a persistent offender to a term of ten years' imprisonment to be served consecutively to an existing ten-year sentence (A-79). Section 570.030.3(3)(A), RSMo 1986. This conviction and sentence for stealing was imposed by the Circuit Court of St. Louis County, Missouri (A-3).

The circumstances surrounding respondent's crime were summarized by the Missouri Court of Appeals on direct appeal.

> On November 22, 1985, a man who identified himself as "Johnny" went into Kirkwood Mitsubishi and told salesman Steven George he wanted to test-drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the keys to the demonstrator Galant.

After a test drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About 15 minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys on the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis city police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photos, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George, and asked him if any of the photos were of the person who was in the dealership

and took a drive in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first degree tampering for operating the Galant in the City of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to 10 years' imprisonment. [The Missouri Court of Appeals] affirmed his tampering conviction on appeal. **State v. McIntyre**, 735 S.W.2d 111 (Mo.App. 1987) [A-73].

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also

> identified defendant in court as "Johnny," the person who test-drove the Galant that later was stolen. Defendant also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the date of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

**State v. McIntyre**, 749 S.W.2d 420 (Mo.App., E.D. 1988) (A-79). After respondent's conviction and sentence, petitioner appealed to the Missouri Court of Appeals. He raised a double jeopardy claim before that court based on **Brown v. Ohio**, 432 U.S. 161 (1977); however, the Missouri Court of Appeals affirmed the conviction and sentence (A-85-A-86). Respondent pursued no state post-conviction remedies (A-6).

On September 2, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (A-94). After litigation before the district court, Magistrate David Noce filed his Report and Recommendation that the petition be denied (A-34). District Judge Edward L. Filippine adopted the recommendation (A-40).

On November 30, 1988, respondent filed a motion to alter or amend the judgment (A-103). The district court ordered petitioners to respond to the pleading (A-42). After further litigation, the Magistrate again recommended that the petition be denied (A-47). The district court adopted the Magistrate's Report and Recommendation (A-66). The district court denied respondent's request for a certificate of probable cause to appeal (A-68); however, the certificate was granted by the Court of Appeals (A-71).

On appeal before the Court of Appeals, petitioners asserted, inter alia, that review of the double jeopardy claim was barred under

the retroactivity rules of **Teague v. Lane**, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (A-8-A-9). The Court of Appeals agreed that **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), was a "new rule" under **Teague** (A-15), but that it fit within the first recognized exception to the **Teague** retroactivity doctrine (A-16-A-22). Citing **United States v. Felix**, 926 F.2d 1522 (10th Cir. 1991), cert. granted, 112 S.Ct. 47 (1991) (A-25), the Court of Appeals determined that respondent's double jeopardy claim warranted relief (A-22-A-32). Petitioners' petition for rehearing or rehearing en banc was denied on August 30, 1991, as amended on September 4, 1991 (A-89). The present petition for writ of certiorari ensues.

# ARGUMENT

## I.

## A habeas corpus applicant may not request the retroactive application of new law under the Double Jeopardy Clause under a theory that the new rule would deprive the government of the power to punishment.

To justify a grant of certiorari, petitioners must show either a conflict between the lower-court opinion and opinions from other circuits or this Court. Alternatively, petitioners must show an important question of federal law which has not been, but should be settled by this Court. Supreme Court Rule 10.1(a), (c). The present case represents an opportunity for this Court to discuss the exceptions to the **Teague** retroactivity rules. Accordingly, the writ of certiorari should issue.

Petitioners candidly admit that they are aware of no classic conflict between the lower-court opinion and the opinions of other

circuits concerning the retroactivity issue. On the other hand, petitioners are aware of no federal court's circumvention of the **Teague** retroactivity rule by finding the existence of the first exception to that rule. The United States Court of Appeals for the Eighth Circuit stands alone on this finding.

Petitioners and the lower court agree that respondent's request that the court apply the double jeopardy principles of **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct 1084, 109 L.Ed.2d 548 (1990), was a request that the court apply "new law" retroactively (A-15). The **Grady** rule was not "dictated" by prior precedent; therefore, it was a "new rule" under **Teague** (A-15).

Petitioners and the lower court agree that the second exception to **Teague** is inapplicable. The Double Jeopardy Clause concepts of **Grady** do not require the observance of procedures that are implicit in the concept of ordered liberty (A-16, quoting **Teague v. Lane**, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

Petitioners and the lower court diverge on the issue of whether the first exception to the Teague retroactivity doctrine is applicable. In Teague, this Court described that exception.

> [A] new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

Teague v. Lane, 109 S.Ct. at 1073, quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.).

Petitioners are aware of no other courts that have found the first exception to be met in determining that the Teague retroactivity doctrine should not apply. The significance of the Court of Appeals' finding of this exception is enormous to the states within the circuit given the track record of the United States Court of Appeals for the Eighth Circuit in applying exceptions to another established doctrine. The Court of Appeals has managed to expand the "extraordinary" exception of

"probable actual innocence" to include a garden-variety of habeas cases. See, e.g., **Pilchak v. Camper**, 935 F.2d 145 (8th Cir. 1991); **Jones v. State of Arkansas**, 929 F.2d 375 (8th Cir. 1991); **Henderson v. Sergeant**, 926 F.2d 706 (8th Cir.), modified, 939 F.2d 586 (8th Cir. 1991); **Bliss v. Arkansas**, 891 F.2d 1335 (8th Cir. 1989); see generally Lay, Statement of Chief Judge Donald P. Lay Eighth Circuit Court of Appeals Before the Senate Judiciary Committee In re: Habeas Corpus Reform in Capital Cases, 19 Capital University Law Review 659 (1990); Lay, The Constitution, the Supreme Court, and Mr. Meese: Habeas Corpus and the Doctrine of Original Intent, 4 Detroit College of Law Review, 983 (1986) (articles discussing author's view of "miscarriage of justice" exception to procedural default analysis). Indeed, in **Pilchak** and **Jones**, the defendants were "innocent" merely because the panels of appellate judges did not like the sentences the defendants received. Petitioners believe that

it is necessary for this Court to review and discuss its construction of the first exception to **Teague** rather than allow the Eighth Circuit to infect itself and other federal courts with an improper interpretation of that exception.

In **Teague**, the Court articulated the first exception to the retroactivity doctrine. Under that exception, a habeas applicant may rely on a "new rule" of law "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" (A-16, quoting **Teague v. Lane**, 490 U.S. at 311). Of course, the **Teague** opinion quotes Justice Harlan's concurrence in **Mackey v. United States**, 401 U.S. at 692.

In **Mackey**, Justice Harlan identifies several examples of this exception. Id. at 692 n. 7. These examples include rules that preclude prosecution of (1) expressive conduct protected by the First Amendment, **Street v. New York**, 394 U.S. 576 (1969); (2) silence protected by the

Fifth Amendment, **Grosso v. United States**, 390 U.S. 62 (1968); (3) certain protected intimate behavior, **Loving v. Virginia**, 388 U.S. 1 (1967); **Griswold v. Connecticut**, 381 U.S. 479 (1965); and (4) conduct in the constitutionally protected privacy of one's home, **Stanley v. Georgia**, 394 U.S. 557 (1969).

Since the double jeopardy rule of **Grady** does not involve the decriminalization of the offense of felony stealing, the first exception from **Teague** is simply inapplicable. The Court of Appeals appears to concede as much from its failure to discuss this **Teague** exception. Rather, the Court of Appeals almost immediately begins its discussion of **Penry v. Lynaugh**, 492 U.S. 302 (1989) (A-16).

A different aspect of the first **Teague** exception was discussed by this Court in **Penry**. In that case, the Supreme Court extended the **Teague** doctrine to capital-sentence collateral proceedings. Accordingly, it was appropriate

that the first **Teague** exception expanded to the context of capital sentences.

The Court of Appeals accurately quotes the language from the **Penry** opinion (A-17). The Court of Appeals then goes on to quote language from **Butler v. McKellar**, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), for the proposition that the "first **Teague** exception [encompasses] '"categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders'" [sic]" (A-18, quoting **Butler v. McKellar**, 110 S.Ct. at 1218). The Court of Appeals interprets the "such as" language as giving it a commission to create new exceptions to the **Teague** retroactivity rule.

Petitioners, however, believe that the "such as" language from this Court referred directly to the language from this Court that followed the "such as" language--that being "a prohibition on the imposition of a particular

punishment on a certain class of offender." Petitioners also believe that this "such as" language refers to the "categorical guarantees accorded by the Constitution" that were discussed in the first aspect of the first **Teague** exception--the guarantees discussed by the Court in **Teague** and by Justice Harlan in **Mackey**. This interpretation is logical. Since **Penry** extended **Teague** to the capital sentencing situation, the first exception had to be modified in order for it to make sense in a sentencing context. Of course, respondent's request for the application of "new law," **Grady**, is unsupported by the plain words of **Teague**, **Penry** or **Butler**. The Court of Appeals provides no explanation for reading the language as something other than what this Court says it means.

This criticism is even more telling in light of the express language in **Saffle v. Parks**, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). In **Saffle**, the Supreme

Court was quite clear as to the scope of the first exception to the **Teague** retroactivity rules:

> The rule sought by Parks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons.

Id. at 1263; see **Smith v. Black**, 904 F.2d 950, 986 (5th Cir. 1990); **Wickham v. Dowd**, 914 F.2d 1111, 1115-1116 (8th Cir. 1990), cert. denied, 111 S.Ct. 2897 (1991). Indeed, in **Wickham**, the Court examined the new rule and determined that it did not protect the petitioner due to his status or due to the nature of the offense. Id. Likewise, the **Grady** "new rule" does not prohibit punishment for reasons of respondent's status or the nature of his offense.

If one were to assume that the previous analysis is incorrect and that this Court wishes the first **Teague** exception to apply to requests for "new law" that this Court has not yet listed, then petitioners suggest that the

Double Jeopardy Clause protections discussed in **North Carolina v. Pearce**, 395 U.S. 711, 717 (1969), are not "categorical guarantees accorded by the Constitution" within the meaning of **Butler v. McKellar**. Those **Pearce** guarantees are the prohibition against a second prosecution for the same offense after acquittal, the protection against a second prosecution for the same offense after conviction, and the protection against multiple punishments for the same offense. Id. At least in the context of the second-trial protections, the Double Jeopardy Clause's protections are procedural in nature and are designed to ensure that the government litigates a criminal prosecution fully in the first trial.

The Court of Appeals discusses extensively the protection against multi-punishment (A-19). The rule in **Grady**, however, does not implicate the multi-punishment protection of the Double Jeopardy Clause. See **United States v. Chippas**, 942 F.2d 498, 500 (8th Cir. 1991), quoting,

**United States v. Oritz-Alarcon**, 917 F.2d 651, 654 (1st Cir. 1991), cert. denied, 111 S.Ct. 2035 (1991). The rule in **Grady** implicates only the protections from second trials. Id. The Court of Appeals' language concerning multi-punishment is absolutely beside the point. Whether the first exception to the **Teaque** retroactivity rule is implicated by the multiple-punishment protection is an issue best left for a multiple-punishment-protection/double jeopardy case, not a successive prosecution case. The multiple-punishment protection is different than the multi-prosecution protection. **North Carolina v. Pearce**, 395 U.S. at 717.

The Court of Appeals also refers the readers to some pre-**Teaque** cases concerning the retroactive application of Double Jeopardy Clause decisions (A-20-A-21, citing **Robinson v. Neil**, 409 U.S. 505 (1973)). After **Robinson**, however, there has been a radical change in this Court's view of the Double Jeopardy

Clause. This Court no longer believes that a double jeopardy claim deprives the trial court of "jurisdiction." Indeed, double jeopardy is now perceived as a personal right that a defendant may waive. See **United States v. Broce**, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Given the change in attitude by this Court, the Court of Appeals' reference to **Robinson** and its underlying rationale is ill-founded.

In **United States v. Broce**, the Court declared that a defendant who has entered a plea of guilty to a criminal charge may not assert a double jeopardy claim in a collateral attack upon the sentence. Id., 109 S.Ct. at 765 (emphasis added). Defendant Broce waived his right to challenge his conviction on double jeopardy grounds by entering the plea of guilty. Id., 109 S.Ct. at 766; see **Taylor v. Whitley**, 933 F.2d 325, 328-329 (5th Cir. 1991); **Horsey v. State**, 747 S.W.2d 748, 754-756 (Mo.App., S.D. 1988). Indeed, the lower court

had held earlier that a valid plea of guilty waives a double jeopardy claim. **United States v. Connelly**, 503 F.2d 520 (8th Cir. 1974); **Harris v. United States**, 237 F.2d 274 (8th Cir. 1956). Respondent's "new rule" hardly constitutes a "categorical guarantee accorded by the Constitution." No aspect of the first exception to the **Teague** retroactivity doctrine is applicable.

Missouri and the other states located in the Eighth Circuit are faced with a court that wishes to extend "categorical guarantees accorded by the Constitution" beyond the two situations discussed by this Court in **Teague** and **Penry**. Where will it stop? Missouri suspects that a variety of common constitutional claims will eventually become "categorical guarantees" within the Eighth Circuit unless this Court grants review. That other courts of appeals may adopt such an elastic reading of this Court's language is possible, if not probable. This Court's grant of a writ of

certiorari will allow this Court to speak authoritatively upon this issue.

## II.

## The Double Jeopardy Clause does not prohibit a second trial for conduct where evidence of that conduct was admitted at an earlier trial, but the government had no burden to present evidence of that conduct or to prove that conduct beyond a reasonable doubt, and where the state proposes to admit evidence of conduct that was proved beyond a reasonable doubt at an earlier trial, but which the government has no burden to present evidence of that conduct or to prove that conduct beyond a reasonable doubt at a second trial.

The United States Court of Appeals for the Eighth Circuit found that respondent's constitutional rights under the Double Jeopardy Clause were violated by his prosecution in the St. Louis County Circuit Court for felony theft after he had been prosecuted in the St. Louis City Circuit Court for the offense of tampering. The tampering conduct occurred on November 24, 1985, in the jurisdiction of the City

of St. Louis. See § 541.033, RSMo 1986 (jurisdiction in county where offense occurred). The felony theft occurred on November 22, 1985, in the jurisdiction of St. Louis County (A-3-A-4). See id. Under the circumstances of this case, respondent is unable to demonstrate a violation of his rights under the Double Jeopardy Clause.

For the purposes of this petition, petitioners will assume the correctness of the lower court's finding that, "at the second trial, for stealing, the government presented essentially the same evidence" (A-27).

In June, 1986, a jury in the Circuit Court of the City of St. Louis found respondent guilty of first-degree tampering under § 569.080, RSMo 1986, based on respondent's operation on November 24, 1985, of an automobile knowing that he acted without the owner's consent. In February, 1987, a jury in the Circuit Court of St. Louis County found respondent guilty of felony stealing under § 570.030, RSMo 1986, based on his stealing an automobile

from a car dealership on November 22, 1985 (A-2-A-3). The issue is thus whether the Double Jeopardy Clause prohibited the second trial, the St. Louis County trial for stealing.

Conspicuously missing from the Court of Appeals' description of the case is the fact that respondent was not convicted or acquitted of an offense from his conduct on November 22, 1985, at respondent's first trial, the June, 1986 trial. Testimony concerning that November 22 conduct was admitted at the first trial; however, the State had no burden to prove that conduct beyond a reasonable doubt. The verdict director for tampering referred only to November 24 conduct. Evidence concerning the November 22 conduct was admitted at the first trial, but simply as "evidence of other crimes" in that it tended to show respondent's knowledge that he was operating the automobile on November 24 without the consent of the owner (A-75-A-76). Nothing in the protection of the Double Jeopardy Clause against a second

prosecution for an offense following acquittal or retrial should prohibit the government's use of such "evidence of other crimes." See e.g., Fed. R. Evid. 404(b) (evidence of other crimes admissible in similar circumstances in civil and criminal federal-court trials); **United States v. Felix**, 926 F.2d 1522, 1534 (10th Cir.) (Anderson, J., dissenting) (condemning reading of Double Jeopardy Clause to eviscerate Fed. R. Evid. 404(b)), cert. granted, 112 S.Ct. 47 (1991). This case does not implicate the double jeopardy protections described by this Court in **North Carolina v. Pearce** since there was no second prosecution following an acquittal or finding of guilty for the November 22 conduct.

In **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), this Court quotes directly the language from **North Carolina v. Pearce** concerning the protections of the Double Jeopardy Clause. **Grady v. Corbin**, 110 S.Ct. at 2090, quoting **North Carolina v.**

**Pearce**, 395 U.S. 711, 717 (1969). The **Grady** Court does not modify those basic protections. The lower court does correctly articulate the rule from **Grady**.

> Once a subsequent prosecution survives the **Blockberger** test, the court must next analyze if "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

[A-23, quoting **Grady v. Corbin**, 110 S.Ct. at 2093]. The error in the lower court's decision is that at respondent's first trial, he was not "prosecuted" for conduct that occurred in St. Louis County on November 22 (stealing); rather, he was prosecuted for conduct and convicted of an offense that occurred in the City of St. Louis, a separate venue, on November 24 (tampering). An examination of the charging document from the first prosecution will reveal that only the November 24 tampering in the City

of St. Louis was charged. An examination of the verdict director will demonstrate that only the November 24 tampering in the City of St. Louis was submitted to the jury (A-28 n. 4). Felony stealing was not charged at the first trial. Only conduct that occurred on November 24 was prosecuted at the first trial. Only conduct that occurred in the City of St. Louis was prosecuted at the first trial. At respondent's second trial, the State proved conduct that constituted an offense for which respondent had not already been prosecuted. There is no doubt that evidence of conduct on November 22 (stealing) was presented at the first trial; however, that was not the conduct for which respondent was being prosecuted.

Does the government's submission of "evidence of other crimes" at the first trial constitute a "prosecution" within the meaning of **Grady**? The Court of Appeals declines to suggest an answer to this question. Indeed, the Court of Appeals declines to suggest this as a

question. Respondent believes that the answer to this question may be found in **Dowling v. United States**, 493 U.S. 342 (1990). In **Dowling**, the government offered other-crimes evidence of the defendant's conduct that occurred two weeks after the charged conduct. The defendant had been acquitted of charges arising from the evidence of other crimes. Notwithstanding that acquittal, the collateral estoppel aspect of the Double Jeopardy Clause did not prohibit introduction of the evidence of other crimes at the later prosecution. The Court reasoned that the burden of proof at the first criminal prosecution differed from that at the second trial where the evidence of other crimes was submitted; thus, the collateral estoppel component of the Double Jeopardy Clause was inapplicable. Id. at 672.

Applying the **Dowling** concepts to the case at bar reveals that respondent was not "prosecuted" for stealing at the first trial. Stealing was not charged in the charging documents.

Stealing was not submitted in the verdict director. Only the November 24, 1985 conduct (tampering) was charged and submitted. Only St. Louis City conduct was charged and submitted. At the first trial, the jury was under no obligation to convict or acquit respondent of stealing. In fact, the government had no obligation to present any evidence of behavior concerning the stealing conduct. Since the first trial had no attributes of a "prosecution" for stealing, the double jeopardy protections of **North Carolina v. Pearce** and **Grady v. Corbin** are inapplicable. See **United States v. Felix**, 926 F.2d at 1534 (Anderson, J., dissenting).

What about the proof of the tampering conduct presented at the second trial for the November 22 stealing? Of course, the stealing indictment did not "require" the tampering conduct to be proved (A-25, quoting **United States v. Felix**, 926 F.2d at 1532 (Anderson, J., dissenting)). The stealing indictment did

not require the proof of conduct that occurred two days later and in a different jurisdiction. Rather, it was purely discretionary with the government to introduce information concerning the tampering conduct. Further, there is no requirement that the tampering conduct be proved to establish an essential element of the stealing offense. The tampering conduct need not be proved beyond a reasonable doubt. Indeed, since tampering was not submitted to the jury in the stealing verdict director, petitioners are hard-pressed to see how it could be "an essential element of the [stealing] offense" (A-25). Indeed, it is conceivable that the jury at the second trial entirely disbelieved the evidence concerning the tampering conduct but still found respondent guilty of the stealing offense. Given that possibility, the question, "Is [tampering] being proven to establish an essential element of the offense for which the defendant is now being prosecuted?", must be answered no (A-25).

From this discussion, it should be apparent that the panel has misapplied the principles of **Grady**, in specific, and **North Carolina v. Pearce**, in general.

Given this Court's recent grant of a writ of certiorari in the **Felix** case, the Court may decide that it is appropriate to remand this cause to the Court of Appeals for further consideration in light of this Court's future opinion in **Felix**. Further, this is an issue of exceptional importance in all cases where "evidence of other crimes" is used to demonstrate motive, intent, common scheme and plan, etc. In reality, the present case is simply an "evidence of other crimes" case. To this date, petitioners are unaware of any court holding that the Double Jeopardy Clause prohibits trial for offenses that were previously presented to a court as "evidence of other crimes."

## III.

## This Court misconstrued the Double Jeopardy Clause of the Fifth Amendment in **Grady v. Corbin**.

This Court's decision in **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), signifies a radical departure from this Court in interpreting the Double Jeopardy Clause of the Fifth Amendment. Petitioners submit that the **Grady** decision is insufficiently supported by precedent and is unworkable in practice and, therefore, should be overruled.

The Double Jeopardy Clause of the Fifth Amendment states:

> [N]or shall any person be subject for the same offense to be put twice in jeopardy of life or limb.

The basic test for determining whether a successive prosecution, involving conduct that violates two distinct statutory provisions, contravenes double jeopardy principles, is set forth in **Blockberger v. United States**, 284 U.S.

299 (1932). Thus, if each statute requires proof of a fact that the other does not, there is no double jeopardy violation. **Iannelli v. United States**, 420 U.S. 770, 785 n. 17 (1975).

In **Grady**, however, this Court determined that a subsequent prosecution must not only survive the **Blockberger** test, **Grady v. Corbin**, 110 U.S. at 2093, but ruled that the Double Jeopardy Clause also bars "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." The emphasis, however, is not on the evidence used to prove that conduct, but, rather, is on what conduct the state will prove. Id.

Petitioners submit that this approach is unworkable. One of the principal problems with this analysis is how to reconcile **Grady** with **Dowling v. United States**, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Under

**Dowling**, the government, in a subsequent prosecution, may introduce evidence of a previous crime--"prove conduct"--to establish a defendant's commission of a later, similar crime-"to establish an essential element"--even if the defendant was acquitted in the previous prosecution. Whenever possible, the government introduces such evidence of a defendant's conduct from a previous prosecution to establish an essential element of an offense in a subsequent prosecution, but such proving of conduct to establish an essential element of an offense in a subsequent prosecution may now be barred by **Grady**.

Thus, it appears that in those cases in which evidence of a defendant's conduct from a previous prosecution would be admissible pursuant to **Dowling** in a subsequent prosecution would often be the same cases that **Grady** bars from being prosecuted. The State is left with little comfort in knowing that although the subsequent prosecution is barred under **Grady**,

if it had not been so barred, the State could have admitted into evidence and established a defendant's guilt via proof of a defendant's conduct from a previous prosecution under **Dowling**. **Grady** may have rendered the government's rights under **Dowling** a nullity in the majority of cases.

The **Grady** opinion also offers few clues as to how a subsequent trial court is to know on what conduct the government relied to garner a conviction in a previous prosecution. Does a defendant's double jeopardy rights in a subsequent prosecution extend only as far as the details of his conduct are contained in the charging document in the previous prosecution? As far as the evidence produced by the state in the previous prosecution? As far as all of the evidence adduced at the previous prosecution, including the defendant's evidence? Whatever minimal attraction the **Grady** approach may have in theory, it is clearly unworkable in practice.

Furthermore, the Court's statement that the critical inquiry is not on the evidence used to prove the conduct for which a defendant has already been prosecuted, but what conduct the State will prove, is a circular syllogism. One could similarly argue that under **Dowling**, the critical inquiry is not on what conduct the state will prove via the evidence from the previous prosecution and that the state wishes to introduce at a subsequent prosecution; rather, the key is what evidence from the previous prosecution the state will use to prove that conduct in a subsequent prosecution. The terms "conduct" and "evidence" do not exist in vacuum, and the **Grady** opinion offers no guidance as to how to separate the two.

Thus, in **Grady**, if the state were to have proceeded and properly prosecuted the defendant for manslaughter by proving Corbin's driving too fast, the state could not have relied on the conduct for which the defendant was previously convicted--driving while intoxicated and

failing to keep to the right of the median. The state, however, may introduce evidence that Corbin was intoxicated and crossed the median, under **Dowling**, to prove the existence of a statutory element--that Corbin was operating a motor vehicle on a public highway--in a subsequent prosecution. It is clear that the two cases cannot be rationally reconciled.

Finally, although the Court claims it has not adopted a single-transaction view of the Double Jeopardy Clause in **Grady**, the effect of **Grady** will be the same. Prosecutors will now be forced to bring all charges against a defendant, growing out of a single criminal transaction, and try the charges in one proceeding. Otherwise, the government runs the great risk of violating the murky waters of **Grady**. In effect, a view that the Court has "steadfastly refused to adopt," **Garrett v. United States**, 471 U.S. 777, 790 (1985), will be adopted.

The significance of this in cross-jurisdictional cases such as the present one (St.

Louis City and St. Louis County) and **United States v. Felix**, 112 S.Ct. 47 (1991) (grant of certiorari) (Western District of Missouri and Eastern District of Oklahoma), is obvious. Under Missouri statute, a court has jurisdiction when the offense occurred within the geographic boundaries of the court. Section 541.033, RSMo 1986. If **Grady** were to remain the controlling law, then the government will only have power to prosecute in one jurisdiction even though a crime spree, conspiracy, etc., occurs in multiple local jurisdictions.

Petitioners submit that the **Grady** decision is irreconcilable with **Dowling** and unworkable in practice. Accordingly, petitioners respectfully request this Court grant certiorari in order to examining the continuing vitality of **Grady**.

## CONCLUSION

Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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No. 91-______

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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PAUL CASPARI and WILLIAM L. WEBSTER

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

PAUL CASPARI and )
WILLIAM L. WEBSTER, )
)
Petitioners, )
)
vs. ) No. 91-__________
)
TERRY D. McINTYRE, )
)
Respondent. )

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## UNITED STATES COURT OF APPEALS

## FOR THE EIGHTH CIRCUIT

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No. 89-2700

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Terry D. McIntyre, )
)
Appellant, )
) Appeal from the United
v. ) States District Court for
) the Eastern District of
Myrna Trickey, ) Missouri.
)
Appellee. )

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Submitted: January 11, 1991

Filed: July 15, 1991

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Before MCMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

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JOHN R. GIBSON, Circuit Judge.

Terry B. McIntyre appeals from the district court's denial of his petition for writ of habeas corpus based on a claim of double jeopardy. McIntyre argues that the government, to

establish essential elements in his prosecution for stealing, proved conduct that constituted an offense, first degree tampering, for which he had earlier been convicted, thus violating the double jeopardy rule announced in Grady v. Corbin, 110 S. Ct. 2084 (1990). The State argues that: 1) McIntyre is procedurally barred from asserting his double jeopardy claim; and that 2) McIntyre cannot assert a Grady claim, as Grady announced a "new rule" that is not retroactively available to federal habeas petitioners. Moreover, the State argues that even if Grady applies, McIntyre cannot prevail under the rule of that case. The magistrate, whose report and recommendation the district court adopted, did not analyze McIntyre's double jeopardy claim under Grady, as Grady had not yet been decided. We reverse the district court's order.

In June 1986, a jury in the circuit court of the City of St. Louis found McIntyre guilty of first degree tampering under Mo. Rev. Stat.

§569.080 (1986), based on his operation on November 24, 1985, of an automobile knowing that he lacked the owner's consent. The Missouri Court of Appeals affirmed the conviction. State v. McIntyre, 735 S.W.2d 111 (Mo. Ct. App. 1987).

In February 1987, a jury in the circuit court in the County of St. Louis found McIntyre guilty of felony stealing under Mo. Rev. Stat. § 570.030 (1986), based on his stealing of that same automobile from a car dealership on November 22, 1985. The Missouri Court of Appeals, rejecting McIntyre's double jeopardy claim, affirmed the conviction. State v. McIntyre, 749 S.W.2d 420 (Mo. Ct. App. 1988). On each conviction, McIntyre was sentenced as a persistent offender to ten years imprisonment, with the second sentence to run consecutively to the first.

The evidence presented at both trials established that on November 22, 1985, a man who

identified himself only as "Johnny" entered the Mitsubishi dealership in Kirkwood, Missouri, and told salesman Steven George that he wanted to test drive a Mitsubishi Galant. While George was getting the keys to a Galant demonstrator, "Johnny" remained in the showroom where he was looking at the interior of another Galant. The showroom car had keys in its ignition, and those keys were similar to the keys of the demonstrator Galant. After "Johnny" took a test drive with George, he gave a set of Galant keys to George, who returned them to the dealership's "key board." About 15 minutes after "Johnny" left the dealership, George and another salesman discovered that the demonstrator Galant was missing and that the keys which George had placed on the board were from the showroom Galant at which "Johnny" had been looking. "Johnny" was the only person who had taken a ride with George in the demonstrator Galant on that day.

On November 24, 1985, two Kirkwood police officers spotted McIntyre driving the demonstrator Galant, which had been listed on a "hot sheet" of stolen cars. After a pursuit, the officers stopped the car and arrested McIntyre, who was driving, and a passenger. When the car was stopped, the missing Galant keys were in the ignition.

In a photographic line-up on November 27, George identified McIntyre as "Johnny." George testified at both of McIntyre's trials, as did Jake Naughton, general manager of the Mitsubishi dealership. Officer Kenneth Hornak, one of the two arresting officers, testified at the tampering trial, while the other officer, Lawrence O'Toole, testified at both trials.

McIntyre first raised his double jeopardy claim prior to his trial on the stealing charge, and he unsuccessfully reasserted this claim on appeal. McIntyre, 749 S.W.2d at 422.

Nothing appears in the record regarding McIntyre's post-conviction proceedings in Missouri state courts. The State admitted in its response to McIntyre's federal habeas petition that McIntyre had exhausted all state remedies on his double jeopardy claim and was not procedurally barred. See Response to Order to Show Cause at 3. In a November 1988 report and recommendation, the magistrate stated that the State had conceded exhaustion. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 2 (magistrate's report) (E.D. Mo. Nov. 2, 1988).

McIntyre has restricted his federal habeas litigation to his double jeopardy claim. In his original federal petition, filed pro se, McIntyre did not cite Grady (as that case had not yet been decided), but he did clearly and thoroughly assert a double jeopardy claim.

In his November 1988 report, the magistrate recommended denying McIntyre's petition because

under Missouri law, tampering is not a lesser included offense of stealing the same vehicle. Slip op. at 3-4 (magistrate's report) (November 2, 1988). The district court adopted the magistrate's report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Nov. 22, 1988). After McIntyre refined and reasserted his claim in a motion to alter or amend judgment, the magistrate issued a second report, again recommending denial of McIntyre's petition. The magistrate reconsidered McIntyre's claim under the "same evidence test"[1] and concluded that despite the use of the same evidence at both trials, the evidence submitted at the tampering trial was not legally

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[1] Prior to Grady, several circuits had developed a "same evidence" test that looked at whether "the evidence required to support conviction in one of the prosecutions is sufficient to support conviction in the other prosecution." United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); see also Grady, 110 S. Ct. at 2094 n.14; United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988).

sufficient to convict McIntyre of stealing. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 12 (magistrate's report) (E.D. Mo. Aug. 8, 1989). The district court adopted the magistrate's second report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Sept. 18, 1989).

Through appointed counsel, McIntyre now presents this double jeopardy claim to this court.

I.

While McIntyre contends that he is entitled to relief under Grady, the State asserts that we must not reach the merits of the Grady claim because: 1) McIntyre asserted a new type of double jeopardy claim in his motion to alter or amend before the district court that was not presented in his original federal habeas petition; 2) the rule of Teague v. Lane, 489 U.S. 288 (1989), bars the application of Grady

because McIntyre's conviction was final before Grady was announced.

The State's first argument can be summarized as follows: In his original habeas petition, McIntyre argued that his double jeopardy claim should be analyzed under the "same offense" test applied in Brown v. Ohio, 432 U.S. 161 (1977). Because McIntyre in his motion to alter or amend urged the court to instead apply the "same evidence" test, he presented a claim different from the one he originally asserted. The State contends that McIntyre's failure to assert the "same evidence" test in his initial federal habeas petition constituted "abuse of the writ" under 28 U.S.C. § 2254, Rule 9(b) (1988), and also resulted in procedural default because McIntyre failed to exhaust the "same evidence" theory in the state courts.

The magistrate's second report, which the district court also adopted, rejected the

State's arguments regarding abuse of the writ and procedural default. The magistrate concluded that the court should address the merits of McIntyre's claim because his motion did not present a new claim, but merely "clarif[ied]" the existing one. Slip op. at 4 (magistrate's report) (Aug. 8, 1989).

The State's argument rests solely on its contention that McIntyre raised a new theory in his motion to alter or amend judgment that he had not presented in his original federal habeas petition. In its response to McIntyre's original federal petition, the State had conceded that McIntyre had exhausted his double jeopardy claim before the state courts and was not procedurally barred from raising the claim presented in that initial petition.

An examination of the pleadings that McIntyre submitted in connection with his initial petition and with his motion to alter or

amend judgment establishes that, contrary to the State's argument, the substance of his claim remained essentially the same. In both the original petition and the motion to alter or amend, McIntyre argued that the government used the same evidence to convict him at both trials, thus violating the Fifth Amendment's double jeopardy clause. Although McIntyre conceded in his motion to alter or amend that Brown v. Ohio, which he had relied on in his original petition, was not persuasive authority for his argument, he otherwise relied on the same authority and asserted the same basic argument.

As McIntyre presented essentially the same claim in his motion to alter or amend judgment as he presented in the original habeas petition, we conclude that the State's arguments regarding abuse of the writ and procedural bar are without

merit.[2] We therefore affirm the district court's order adopting the magistrate's report and recommendation on this issue.

## II.

The State next argues that Teague v. Lane, which held that federal habeas petitioners may not attack their conviction by relying on a rule of law established after their conviction became final, 489 U.S. at 310, prevents McIntyre from relying on Grady.[3] McIntyre counters that Grady did not announce a "new rule" under Teague, but

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[2] The State cites two cases, Buckley v. Lockhart, 892 F.2d 715, 719 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990), and Gilmore v. Armontrout, 861 F.2d 1061, 1064-65 (8th Cir. 1988), cert. denied, 490 U.S. 1114 (1989), to support its argument that McIntyre is procedurally barred on his same evidence theory. These cases are clearly distinguishable from the one before us, as the essence of McIntyre's claim remained the same.

[3] Direct review of McIntyre's second conviction was complete in May 1988. The Supreme Court announced Grady in May 1990.

merely built upon the Court's previous double jeopardy decisions, including Illinois v. Vitale, 447 U.S. 410 (1980).

Under Teague, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original). See also Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (test is whether a state court considering petitioner's claim at the time the conviction became final "would have felt compelled by existing precedent to conclude that the rule [petitioner sought] was required by the Constitution").

Grady held that "a subsequent prosecution must do more than merely survive the Blockburger test." 110 S. Ct. at 2093. See Blockburger v. United States, 284 U.S. 299, 304 (1932) (double jeopardy clause is not violated if each statute requires proof of a fact which the other does

not). Even if the Blockburger "same offense" test is satisfied, the double jeopardy clause still bars the "subsequent prosecution [if] the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093.

An examination of Grady establishes that this rule was not dictated by precedent existing at the time McIntyre's conviction became final, and thus, was a new rule. In fact, the Grady Court explicitly stated that it was "adopt[ing] the suggestion set forth in Vitale." 110 S. Ct. at 2087 (emphasis added). See also id. at 2093 ("As we suggested in Vitale. . . .") (emphasis added).

Justice Scalia's dissenting opinion in Grady, joined by Justices Rehnquist and Kennedy, leaves no doubt that the dissent also regarded

the Grady test as a new rule. The dissent attacked the majority for "departing from clear text and clear precedent with no justification except the citation of dictum in a recent case (dictum that was similarly unsupported and inconclusive to boot)." 110 S. Ct. at 2096 (Scalia, J. dissenting).

An examination of Vitale, relied on by the Grady majority, confirms that Grady indeed announced a new rule. While Vitale merely urged an expanded approach to double jeopardy analysis, see Vitale, 447 U.S. at 420, Grady explicitly prescribed a new test to be applied in cases involving subsequent prosecutions that do not violate the Blockburger rule. As the Grady rule was not "dictated" by precedent, we conclude that it is therefore a "new rule" under Teague.

Our analysis of the Teague issue does not, however, end with our conclusion that Grady

announced a new rule. Despite the general bar on retroactive application of new rules for cases on collateral review, new rules under Teague are fully retroactive if they fit into one of two exceptions. Teague, 490 U.S. at 311.

Teague stated that a habeas petitioner may rely on a new rule: 1) "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"; or 2) "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Id. As a double jeopardy rule does not concern the fairness of the procedures used to convict, the second exception is not applicable here.

The first exception, narrowly defined in Teague, was expanded in Penry v. Lynaugh, 492 U.S. 302 (1989), a case addressing the constitutionality of imposing the death penalty

on mentally retarded defendants. Although Teague described the first exception as "focusing solely on new rules according constitutional protection to an actor's primary conduct," id. at 329, Penry suggested that the first exception also encompasses "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." Id. Deciding that a new rule prohibiting the execution of mentally retarded defendants would fit within the first Teague exception, the Court explained:

> "[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity [expressed in Mackey v. United States, 401 U.S. 667 (1971)] have little force."

492 U.S. at 330. The Penry Court added: "'There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" Id.

(citing Mackey, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). Thus, the first Teague exception "cover[s] not only rules forbidding criminal punishment of certain kinds of primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 429 U.S. at 330.

In Butler v. McKellar, 110 S. Ct. 1212 (1990), and Saffle v. Parks, 110 S. Ct. 1257 (1990), the Court described the first Teague exception as encompassing "'categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders.'" Butler, 110 S. Ct. at 1218 (emphasis added). See also Saffle, 110 S. Ct. at 1263 (same). Thus, the Court cited the rule discussed in Penry as an illustrative example of a categorical constitutional guarantee, but did not use that rule to limit the scope of the exception.

The Fifth Amendment states that "[n]o person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court labeled the double jeopardy clause a "basic constitutional guarantee," id. at 718, and quoted an 1873 case that stated: "'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court on the same facts, for the same statutory offense.'" Id. at 717-718 (quoting Ex Parte Lange, 18 Wall. 163, 168 (U.S. 1873)).

The protection afforded by the double jeopardy clause operates at an elemental level. The purpose of the clause is not to ensure the fairness of the trial, but to prevent the trial from

taking place at all. See Robinson v. Neil, 409 U.S. 505, 509 (1973). Because it bars an unconstitutional prosecution, a rule concerning double jeopardy is analogous to the rule discussed in Penry, which would have barred the imposition of an unconstitutional punishment. See Penry, 492 U.S. at 329-30. It thus follows that the prohibition on double jeopardy is a "categorical guarantee[] accorded by the Constitution." See Butler, 110 S. Ct. at 1218. We therefore conclude that a rule concerning double jeopardy, such as the Grady rule, falls under the first Teague exception and must be accorded full retroactive effect.

Our conclusion finds further support in the pre-Teague opinion of Robinson v. Neil, in which the Court accorded full retroactive effect to the double jeopardy rule it had earlier announced in Waller v. Florida, 397 U.S. 387 (1970). In Robinson, the Court refused to apply the prevailing standard, as prescribed in

Linkletter v. Walker, 381 U.S. 618 (1965), for determining the retroactivity of constitutional rules. It stated that a rule concerning double jeopardy did not "readily lend[] itself" to a Linkletter analysis. Robinson, 409 U.S. at 507. The Court reasoned that while the double jeopardy guarantee, like other constitutional guarantees, is a right of the criminal defendant, "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." Id. at 509.

Although Robinson has been superseded by Teague, we believe that the Robinson Court's observation about the nature of the double jeopardy guarantee retains its force and is relevant to the issue before us. Because the double jeopardy clause prevents an unconstitutional trial from taking place, it deprives the court of jurisdiction. Historically, federal habeas review has existed to permit convicted prisoners

to challenge the jurisdiction of the trial court. See 3 W. LaFave & J. Israel, Criminal Procedure § 27.3(a) (1984).

We therefore hold that although Grady announced a new rule, that rule is nonetheless available to petitioners challenging their convictions on collateral review.

## III.

We now address the merits of McIntyre's double jeopardy claim. McIntyre argues that he is entitled to relief under Grady because his conviction for stealing relied on proof of conduct for which he had already been prosecuted. The State counters that McIntyre's double jeopardy rights were not violated because the tampering prosecution concerned conduct that occurred on the day that he was caught operating the car, while his stealing trial concerned conduct that occurred on the day he stole the car.

There is no dispute that Grady provides the relevant standard. The Supreme Court intended Grady "to guide double jeopardy analysis in all cases involving successive prosecutions." United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990), petition for cert. filed, No. 90-1527 (Apr. 3, 1991). See also United States v. Easley, 927 F.2d 1442, 1451 (8th Cir. 1991).

Once a subsequent prosecution survives the Blockburger test, the court must next analyze if "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093. In Grady, the Court held that this rule barred the subsequent prosecution of a motorist for criminally negligent homicide and assault after he had earlier pled guilty to driving while intoxicated and failing to keep to the right of the median

in connection with the same collision. Id. at 2094. The Court stated:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted -- driving while intoxicated and failing to keep to the right of the median -- to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution. . . .

Id.

The Court added, however, that its holding would not bar a subsequent prosecution on the homicide and assault charges if the State relied solely on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. The Court clarified its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from introducing that same evidence in a subsequent proceeding." Id. at 2093. It explained: "The critical inquiry is what conduct the State will prove, not the

evidence the State will use to prove that conduct." Id.

Under Grady, we must answer two questions: 1) Is the conduct the indictment requires to be proven conduct that constitutes an offense for which the defendant has previously been prosecuted? and 2) Is it being proven to establish an essential element of the offense for which the defendant is now being prosecuted? See United States v. Felix, 926 F.2d 1522, 1532 (10th Cir. 1991) (Anderson, J., dissenting), petition for cert. filed, No. 90-1599 (Apr. 15, 1991).

In McIntyre's first trial, for tampering, the government presented the testimony of the two police officers who arrested McIntyre. They testified how they spotted the stolen Galant, pursued the vehicle and stopped it, and apprehended the driver, who turned out to be McIntyre. One of the officers testified that Mitsubishi keys were found in the ignition.

Jake Naughton, manager of the Mitsubishi dealership, testified that he had observed McIntyre speaking to salesman George on the day the car was stolen, that he saw George and McIntyre leave together to go on a test drive, and that the keys returned to the key board did not belong to the demonstrator Galant. Naughton also testified that McIntyre's use of the car on the day of the arrest was without permission. In his testimony, George identified McIntyre as the man he had observed looking at the showroom Galant and whom he later accompanied on a test drive of the demonstrator car. George also testified that McIntyre, after the drive, returned a set of Mitsubishi keys that were later discovered to be the keys to the showroom Galant. George also testified that he had examined the keys found in the car when McIntyre was apprehended, and that one of those keys belonged to the stolen car.

At the second trial, for stealing, the government presented essentially the same evidence. Again, Naughton and George testified as to the events that transpired at the dealership on November 22, 1985. One of the two arresting officers testified again, describing how he and his partner had observed the stolen car, pursued and stopped it, and apprehended McIntyre. The officer also testified that he saw keys in the ignition. The government also presented the testimony of a detective who had not testified at the first trial and who described the photographic lineup in which George had identified McIntyre.

Applying the Grady test to the facts before us, we focus on the conduct the government proved, not the evidence it used to prove that conduct. See Grady, 110 S. Ct. at 2093.

In the first trial, the government proved first degree tampering by establishing that

McIntyre was apprehended while operating the car, that McIntyre lacked the dealership's consent to operate the car, and that he operated the car knowing that he lacked that consent.[4] While the testimony about the events at the car dealership did not directly concern McIntyre's operation of the car, it was relevant to the

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[4] The Court charged the jury in the tampering case as follows:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> > First, that on November 24, 1985, . . . the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi; and
> >
> > Second, that he operated the automobile without the consent of the owner, and
> >
> > Third,. that he operated knowing that he did so without the consent of the owner, then you will find the defendant guilty of tampering in the first degree. . . .

owner's lack of consent and McIntyre's knowledge that he lacked consent.

At the stealing trial, the government proved the same conduct that it had proved to establish the entirety of the tampering offense. Thus, the answer to the first inquiry under Grady -- whether the conduct being proven is conduct that constitutes a previously prosecuted offense -- must be "yes".

The second step in our analysis focuses on whether the conduct was proved to "establish an essential element" in the second prosecution. The elements of stealing, as stated in the charge to the jury, are:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First . . . the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and
>
> Second, the defendant did so without the consent of Kirkwood Mitsubishi, and

> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,
>
> then you will find the defendant guilty of felony stealing.

The conduct constituting the tampering offense was proved in the second trial to establish essential elements of the stealing charge. The testimony regarding the visit to the car dealership, together with the testimony concerning McIntyre's operation of the car, proved the entirety of the tampering offense, and nearly the entirety of the stealing offense. The only new witness presented by the government at the stealing trial was Detective Schneedle, who testified regarding the photographic lineup and George's identification of McIntyre. Even accepting that this testimony was necessary to help establish the first element of the stealing charge, the conduct proved at the first trial established the whole of the next two elements -- the owner's lack of consent and McIntyre's

purpose of withholding the car permanently from the owner.

Therefore, we conclude that McIntyre's second prosecution violated the rule of Grady because the government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted. See Grady, 110 S. Ct. 2093.

The State tries to distinguish from Grady by arguing that McIntyre was convicted of tampering based on the events that occurred on November 24, 1985, and that he was convicted of stealing based on events that occurred on November 22, 1985.

We are not persuaded by this argument. At both trials, the government proved McIntyre's conduct on both dates to establish the various elements of both tampering and stealing. We

also note the Court's admonition in Brown v. Ohio, 432 U.S. 161, 169 (1977): "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." See also United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990) (discussing the auto stealing and joyriding prosecutions at issue in Brown as constituting a single course of conduct and distinguishing that case from those involving a continuous criminal enterprise), cert. denied, 111 S.Ct. 2010 (1991).

We therefore hold that the government's prosecution of McIntyre for stealing violated the Fifth Amendment's guarantee against double jeopardy. For the foregoing reasons, we reverse the judgment of the district court, and remand with instructions to grant the writ of habeas corpus.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Plaintiff, )
)
v. ) No. 88-1708 C (2)
)
MYRNA TRICKEY, and )
WILLIAM L. WEBSTER, )
Attorney General, )
State of Missouri,[1] )
)
Defendant. )

## REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This cause is before the Court on the petition of Missouri state prisoner Terry D. McIntyre for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the

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[1] Because petitioner is challenging a sentence to be served in the future, William L. Webster, Attorney General for the State of Missouri, is a proper party respondent. 28 U.S.C. §2254, Rule 2(b). Myrna Trickey is a proper, but nominal, party respondent. Id.

undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

In 1987, petitioner Terry D. McIntyre was convicted of first-degree tampering and stealing a motor vehicle by the Circuit Courts of the City of St. Louis and St. Louis County, respectively. He was sentenced to two ten-year terms of imprisonment, said sentences to run consecutively. Petitioner is presently incarcerated at the Missouri Eastern Correctional Center in Pacific, Missouri. Petitioner is herein challenging only his conviction and sentence for stealing a motor vehicle from the Circuit Court of St. Louis County; he does not challenge his first-degree tampering conviction from the Circuit Court of the City of St. Louis in the instant action. Petitioner's conviction and sentence from the Circuit Court of St. Louis County were affirmed on direct appeal. State of Missouri v. McIntyre, 749 S.W.2d 420 (Mo. App. 1988). (Resp. Exh. E.)

On September 2, 1988, petitioner filed the instant petition for a writ of habeas corpus. He asserts one ground for relief: his conviction for stealing a motor vehicle violates his Fifth Amendment right against double jeopardy. Specifically, petitioner argues that the evidence used against him in the prosecution of the tampering charge was also utilized to gain a conviction in the stealing charge. Petitioner contends that the tampering and stealing a motor vehicle offense constitute the same offense.

In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised the instant ground for federal habeas relief amongst several others. (Resp. Exh. C, at 4-5.) Respondent concedes that this ground is exhausted. (Response to Order to Show Cause, at 3-4.) Therefore, this ground may be addressed on the merits by this Court. Purnell v. Missouri Department of Corrections, 753 F.2d 703, 708 (8th Cir. 1985).

Petitioner relies upon Brown v. Ohio, 432 U.S. 161 (1977) to support his argument that his right against double jeopardy was violated. In Brown, the defendant was arrested for "joy riding," pled guilty, and served a short jail sentence. Id., at 168-170.

Although petitioner argues that the facts of his case are identical to the facts of Brown, the undersigned concludes that they are not identical. Under Missouri law, tampering with a motor vehicle is not a lesser-included offense of stealing the same vehicle. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422; State of Missouri v. Smith, 655 S.W.2d 626, 627-28 (Mo. App. 1983); State of Missouri v. Rivers, 663 S.W.2d 255, 256 (Mo. App. 1983); State of Missouri v. Gobble, 675 S.W.2d 944, 948-49 (Mo. App. 1984); State of Missouri v. Souders, 703 S.W.2d 909, 911 (Mo. App. 1985). Furthermore, the Missouri Court of Appeals found that "the tampering was not a part of the stealing that had occurred two days earlier" for which

petitioner was subsequently convicted and sentenced in the Circuit Court of the City of St. Louis. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422.

This Court cannot reinterpret Missouri statutes after a finding of state law made by a state appellate court. Wilkerson v. Wyrick, 806 F.2d 161, 164 (8th Cir. 1986); Harkins v. Wyrick, 589 F.2d 387, 391 (8th Cir. 1979) Because tampering is not a lesser-included offense of stealing a motor vehicle under Missouri law, the undersigned concludes that there is no violation of petitioner's right against double jeopardy.

## RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the petition of Terry D. McIntyre for a writ of habeas corpus be denied without further proceedings. The parties are advised that they have eleven (11) days to file

written objections to this Report and Recommendations.

---David D. Noce------
UNITED STATES MAGISTRATE

Signed this 2nd day of November, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Petitioner, )
)
v. ) No. 88-1708 C (2)
)
MYRNA TRICKEY, and )
WILLIAM WEBSTER, )
Attorney General, )
State of Missouri, )
)
Respondents. )

## ORDER

This matter is before the Court on the petition of Terry D. McIntyre for a writ of habeas corpus. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Petitioner has objected thereto.

After consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that the petition of Terry D. McIntyre for a writ of habeas corpus is DISMISSED.

Dated this 22nd day of November, 1988.

--Edward L. Filippine--
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Petitioner, )
)
v. ) No. 88-1708 C (2)
)
MYRNA TRICKEY, and )
WILLIAM WEBSTER, )
Attorney General, )
State of Missouri, )
)
Respondents. )

## ORDER

This cause has been remanded to the undersigned for consideration of petitioner's motion to alter or amend judgment, filed December 2, 1988. 28 U.S.C. §636(b).

Petitioner's petition for a writ of habeas corpus argued that his conviction in the Circuit Court of St. Louis County was unconstitutional under the Double Jeopardy clause because of his prior conviction in the Circuit Court of the City of St. Louis. The petition was denied primarily because Missouri courts have held that tampering with a motor vehicle (City court

conviction) is not a lesser-included offense of stealing the same vehicle (County court conviction).

Petitioner relied primarily on Brown v. Ohio, 432 U.S. 161 (1977) in his original petition for a writ of habeas corpus. Although Brown arguably supports the theory petitioner advances in the current motion, factual distinctions between that case and this one made Brown relatively weak authority for his position. See, Brown, supra, 432 U.S. at 166-67 n.6.

The aspect of petitioner's argument which becomes clearer in the current motion is that while the lesser-included offense test is the appropriate test for Double Jeopardy violations involving multiple convictions in a single trial, his situation involved convictions imposed in successive prosecutions. He correctly argues that a different test should have been applied:

> Where the plea is against the imposition of cumulative sentences for multiple convictions obtained at a single criminal trial, double jeopardy's role is limited to assuring that

> the sentencing court does not exceed its legislative authorization by imposing more than one punishment for something the legislature has defined as a single crime. Brown [v. Ohio, supra], 432 U.S. at 165 . . . . In this context, the established test for determining whether two offenses are the "same" is that first set forth in Blockburger v. United States, 284 U.S. 299, 304 . . . (1932). The Blockburger test, which is essentially one of legislative intent, focuses on the formal elements of the two crimes, finding them to be different offenses if each requires proof of a fact which the other does not. Id.
>
> . . . The general test for determining whether successive prosecutions involve the "same offense" is . . . a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them. Under this "same evidence" test, the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged.

United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988) (citations omitted); see, United States v. Reiter, 848 F.2d 336, 341 (2nd Cir. 1988).

Under the latter test, which is applicable in this case, the appropriate inquiry is whether

the evidence actually adduced at petitioner's first trial (for first-degree tampering) would have sufficed to support his subsequent conviction (for automobile theft). Although the record before this Court is insufficient to make such a determination, it appears that in petitioner's trial for tampering, the state introduced evidence tending to prove that petitioner had stolen the vehicle in question. The Missouri Court of Appeals ruled that such evidence was admissible on the ground that evidence linking petitioner with the theft of the car tended to establish his knowledge that he was operating the car without the consent of the owner, which was an element of the state's case in the tampering conviction. State of Missouri v. McIntyre, 735 S.W.2d 111, 112 (Mo. App. 1987).

It thus appears petitioner has set out a viable ground for granting the motion to amend or alter the judgment. However, since issues have been raised to which the respondent has not had the opportunity to respond, and since the

trial records are not presently part of the record before the Court, this matter should be stayed pending submission of briefs and documentation by the parties.

In view of the above discussion,

**IT IS HEREBY ORDERED** that respondent file a response to petitioner's motion within twenty (20) days. Respondent shall include the records of petitioner's trials in her response. After respondent files her response, petitioner may have twenty (20) days thereafter to file a traverse with the Court. The Clerk of the Court shall provide respondent a copy of petitioner's December 2, 1988 motion to alter or amend judgment along with a copy of this order.

--David D. Noce---
UNITED STATES MAGISTRATE

Signed this 24th day of April, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Petitioner, )
)
v. ) No. 88-1708 C (2)
)
MYRNA TRICKEY, and )
WILLIAM WEBSTER, )
Attorney General, )
State of Missouri, )
)
Respondents. )

## REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This cause has been remanded to the undersigned United States Magistrate for consideration of the motion to alter or amend judgment filed by petitioner Terry D. McIntyre. 28 U.S.C. §636(b).

In his petition for a writ of habeas corpus, McIntyre argued that his conviction in the Circuit Court of St. Louis County was unconstitutional under the Double Jeopardy clause because of his prior conviction in the Circuit Court of the City of St. Louis. The petition was denied in part because Missouri courts have

held that tampering with a motor vehicle (City court conviction) is not a lesser-included offense of stealing the same vehicle (County court conviction).[1]

Petitioner relied primarily on Brown v. Ohio, 432 U.S. 161 (1977), in his original petition for a writ of habeas corpus. Although Brown arguably supports the theory petitioner advances in the current motion, factual distinctions between that case and this one made Brown relatively weak authority for his position. See, Brown, supra, 432 U.S. at 166-67 n.6. The aspect of petitioner's argument which becomes clearer in the current motion is that while the "lesser-included offense" test is the appropriate test for Double Jeopardy violations involving multiple convictions in a single trial, his

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[1] The undersigned hereby adopts and incorporates the Report and Recommendation filed on November 2, 1988, and the Order filed on April 24, 1989, except as may be noted herein.

situation involved convictions imposed in successive prosecutions. He correctly argues that a different test, the "same evidence" test, should have been applied. Under this "same evidence" test, the second prosecution is barred by the constitutional prohibition against double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged. United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988) (citations omitted); see, United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); United States v. Reiter, 848 F.2d 336, 341 (2nd Cir. 1988).

Respondents first argue that petitioner's motion to alter or amend the Court's judgment should be denied because petitioner is actually seeking to add a new claim to his petition. This, respondents contend, constitutes abuse of the writ. Furthermore, respondents claim that petitioner cannot demonstrate "cause" for his failure to assert the "new double jeopardy

claim" in his initial petition. Respondents argue that petitioner failed to present this aspect of his double jeopardy claim to the state courts. Therefore, his claim is procedurally barred from federal habeas review absent a showing of cause and prejudice pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977). Finally, respondents argue that petitioner's claim is "facially frivolous" because the City of St. Louis and St. Louis County are two different sovereigns.

"A district court has broad discretion in ruling upon a Rule 60(b) motion . . . ." Cox v. Wyrick, No. 88-2602, slip op. at 3 (8th Cir. April 26, 1989). Rule 60(b) relief is appropriate "where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship." Id., quoting, Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989).

The undersigned concludes that petitioner's double jeopardy claim as now understood should be addressed by the Court so as to prevent an

undue hardship to petitioner. Cox, supra, No. 88-2602, slip op. at 3. A pro se petitioner should not be held to the strict pleading requirements imposed upon attorneys especially where his initial petition generally invokes the basic constitutional protection he later alleges has been violated. See, e.g., Wallace v. Lockhart, 701 F.2d 719, 727 (8th Cir.), cert. denied, 464 U.S. 934 (1983); Hill v. Wyrick, 570 F.2d 748, 751-52 (8th Cir.), cert. denied, 436 U.S. 921 (1978); see also, Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). The undersigned concludes that petitioner is not attempting to add a new claim to his petition but rather clarifying his pro se arguments.

Respondents next argue that petitioner's "new double jeopardy claim" was not presented to the state courts and is thus subject to a procedural bar in this proceeding. In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised a double jeopardy ground amongst several others. (Resp. Exh. C,

at 4-5.) Although petitioner has now proposed a different (and correct) test for examining his ground, the constitutional basis of his claim has not changed after it was before the state courts. Petitioner has exhausted his federal habeas ground in the state courts, and it may therefore be addressed in this proceeding. Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988).

Finally, respondent argues that petitioner's claim is frivolous and should be dismissed because he was tried and convicted by two different sovereigns -- the City of St. Louis and St. Louis County. Respondents contend that each jurisdiction was exercising its own sovereignty in prosecuting petitioner and that the Circuit Court of the City of St. Louis could not convict anyone of a crime which occurred in St. Louis County. This argument is without merit. The dual sovereignty doctrine provides that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the

law of each, he has committed two distinct offenses for double jeopardy purposes. Heath v. Alabama, 474 U.S. 82, 88 (1985). In applying the doctrine, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power." Id. The dual sovereignty principle's application cannot be restricted to cases in which two prosecuting sovereigns can demonstrate that if only one of them is allowed to exercise jurisdiction over the defendant, the second one's "legitimate interests" will not be vindicated. If the prosecuting entities are separate sovereigns, the circumstances of the case and the particular "interests" of each are not relevant to the other. Id., at 91-92.

The circuit courts of Missouri are granted jurisdiction over felony trials by the State of

Missouri. Mo. Const., Art. V, §14(a); R.S.Mo. §542.020 (1986). Thus, circuit courts for the City of St. Louis and St. Louis County "draw their authority to punish the offender" from the same source of power. Heath, supra, 474 U.S. at 88. These local governmental entities cannot be considered separate sovereigns for double jeopardy purposes. Id.; Waller v. Florida, 397 U.S. 387, 394-95 (1970). The double jeopardy clause bars successive prosecutions by a local government and a state in which it is located or by two local governments in the same state. Heath, supra, 474 U.S. at 88; Waller, supra, 397 U.S. at 395; Brown v. Ohio, supra, 432 U.S. at 169.

Turning to the merits of petitioner's federal habeas ground, it is again recognized that the appropriate inquiry is whether the evidence actually adduced at petitioner's first trial (for first-degree tampering) would have sufficed to support his subsequent conviction (for automobile theft). Ragins, supra, 840 F.2d at 1188; see Tercero, supra, 580 F.2d at 314. The record

before the Court now includes the transcript and legal file of petitioner's conviction in the City of St. Louis as well as the transcript of petitioner's trial in St. Louis County. (Supplemental exhibits filed May 12, 1989).

At the petitioner's trial for automobile tampering in the City of St. Louis, the prosecution witnesses included the arresting police officers (O'Toole and Harnak) and the general manager and salesman of the automobile dealership from which the vehicle at issue was stolen (Naughton and George). (Transcript, Vol. I and II.) Evidence was introduced regarding petitioner's arrest on November 24, 1985 for auto tampering in the City of St. Louis. (Id., Vol. II, at 180-293.) This testimony clearly established that petitioner was operating the automobile in question. (Id.) Further testimony was received regarding petitioner's visit to the automobile dealership on November 22, 1985. (Id., at 294-350.) This evidence established that petitioner had visited the automobile

dealership, taken a test drive in the vehicle with a salesman and departed the dealership shortly thereafter. Testimony was also given to the effect that petitioner had the opportunity to provide a different set of keys to the salesman and that after petitioner's departure, the vehicle was missing from the dealership. (Id.)

The defense introduced testimony by Betty Wehmeyer, the records officer at St. Mary's Honor Center where petitioner then resided. (Id., at 351-379.) Her testimony and Honor Center records established that petitioner's whereabouts were accounted for at the time he was allegedly at the automobile dealership. (Id.) Petitioner also testified regarding his activities on the dates of November 22, 23 and 24, 1985. (Id., at 380-436.) Petitioner stated that he never visited the dealership and was at the Honor Center at the time he allegedly took a test drive and when the automobile was noticed as missing. (Id.)

The jury was given the following instruction (among others) to guide its deliberations:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on November 24, 1985, in the City of St Louis, State of Missouri, the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi, and
>
> Second, that he operated the automobile without the consent of the owner, and
>
> Third, that he operated knowing that he did so without the consent of the owner,
>
> then you will find the defendant guilty of tampering in the first degree.
>
> However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, then you must find the defendant not guilty of that offense.

[Instruction No. 6, in accordance with MAI-CR 23.21, Resp. Exh. "Legal File" on appeal to the Missouri Court of Appeals, Eastern District, in Cause No. 51914, at 40.) The jury returned a

verdict of guilty in accordance with this instruction. (Id., at 44.)

At petitioner's trial for automobile theft, the prosecution again presented the testimony of the dealership general manager and the salesman (Naughton and George). (Resp. Exh. A, at 20-38, 55-63.) Their testimony was essentially the same as that presented at petitioner's trial for automobile tampering. Officer O'Toole also testified and his testimony was also essentially the same as that given during the earlier trial albeit less detailed in some respects. (Id., at 39-44.) Finally, officer Jack Schneedle of the Kirkwood, Missouri Police Department testified about the photographic display he presented, after petitioner's arrest for automobile tampering, to the automobile dealership personnel. Petitioner was identified as the suspected automobile thief. (Id., at 44-54.) Officer Schneedle also testified as to the distances between the automobile dealership and the

general area of St. Mary's Honor Center (where petitioner resided). (Id.)

Finally, petitioner testified at his second trial. (Id., at 124-142.) He stated that he never visited the dealership on the date in question and that, in fact, he had left his school assignment that date and returned directly to the Honor Center, arriving there before he allegedly departed from the automobile dealership. (Id.) The defense attempted to buttress petitioner's testimony with the testimony of Lewis Baring, chief of custody at St. Mary's Honor Center, and Eldon Gravett, a former correctional officer at the Center. (Id., at 64-123.) These witnesses explained the Center's procedures for accounting for each inmate throughout the Center's daily routine and explained the Center's records on petitioner's whereabouts for November 22, 1985 between the hours of 9:00 a.m. and 10:00 p.m. (Id.)

The jury at this trial was given the following instruction (among others) to guide its deliberations:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First that on or about November 22, 1985, in the County of St. Louis, State of Missouri, the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and
>
> Second, that defendant did so without the consent of Kirkwood Mitsubishi, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,
>
> then you will find the defendant guilty of felony stealing.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.
>
> If you do find the defendant guilty of felony stealing, you will return a verdict finding him guilty of felony stealing.

(Resp. Exh. B, at 28.) The jury returned a verdict of guilty in accordance with this instruction. (Id., at 33.)

After a review of the record, the undersigned concludes that the evidence adduced at petitioner's first trial (for first-degree tampering) could not have sufficed to support his subsequent conviction for automobile theft. Ragins, supra, 840 F.2d at 1188; see, Tercero, supra, 580 F.2d at 314. Specifically, there was insufficient evidence presented at petitioner's first trial to demonstrate that petitioner was able to be present at the Kirkwood automobile dealership at the approximate time attested to by Naughton and George and to return to St. Mary's Honor Center in time to be counted as present in the Center's records by the evening "count." The travel time testimony of Officer Schneedle is critical in this regard. Indeed, the St. Louis County trial court recognized that whether petitioner was present at the automobile dealership on November 22, 1985, at

approximately 4:00 p.m., was a critical issue at petitioner's trial for auto theft (unlike his earlier trial for tampering.) The court gave the following instruction:

> One of the issues in this case is whether the defendant was present at 1040 North Kirkwood Road, in the City of Kirkwood, in the County of St. Louis, State of Missouri, on November 22, 1985, at approximately 4:00 p.m. On that issue you are instructed as follows:
>
> 1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.
>
> 2. If the evidence in this case leaves in your mind a reasonable doubt that the defendant was present at 1040 North Kirkwood Road, in the City of Kirkwood, in the County of St. Louis, State of Missouri, on November 22, 1985, at approximately 4:00 p.m., then you must find the defendant not guilty.

(Resp. Exh. B, at 30.) The testimony of Officer Schneedle regarding the time required to travel from the Kirkwood automobile dealership to the general area of St. Mary's Honor Center provided the jury a reasonable basis on which to find

that defendant was present at the automobile dealership at approximately 4:00 p.m. on November 22, 1985, as Naughton and George alleged. Furthermore, the testimony of Baring and Gravett further detailed the procedures at St. Mary's Honor Center in accounting for inmates. From this evidence, a jury could reasonably find that petitioner did indeed visit the dealership and return to the Center in time to be counted "present" at the next "count" of inmates.

The foundation of petitioner's double jeopardy is his claim that the same evidence was used to convict him in his trial for automobile theft as was used in his earlier trial for automobile tampering. As noted, some of the evidence was presented at both trials. It appears to the undersigned that this "overlapping" was the result of the prosecution's attempt in the first trial to demonstrate that petitioner had knowledge that the automobile in which petitioner was apprehended was stolen. Petitioner then presented evidence of this whereabouts at the

time and date of his alleged visit to the automobile dealership to rebut the prosecution's evidence of the "knowingly" element of the automobile tampering charge. However, despite this use of some evidence at both trials, the undersigned concludes that the evidence submitted at petitioner's trial for automobile tampering was legally insufficient to convict him of automobile theft. In sum, the undersigned concludes that petitioner's motion to alter or amend the Court's judgment should be denied.

## RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the motion of Terry D. McIntyre to alter or amend the judgment previously entered in this cause be denied. The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation.

--David D. Noce ---
UNITED STATES MAGISTRATE

Signed this 7th day of August, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Petitioner, )
)
v. ) No. 88-1708 C (2)
)
MYRNA TRICKEY, and )
WILLIAM WEBSTER, )
Attorney General, )
State of Missouri, )
)
Respondents. )

## ORDER

This matter is before the Court on the petitioner's motion to alter or amend judgment. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Petitioner has objected thereto.

After careful consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that petitioner's motion to alter or amend the judgment previously entered in this cause is denied.

Dated this 18th day of September, 1989.

--Edward L. Filippine--
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Petitioner, )
)
v. ) No. 88-1708 C (2)
)
MYRNA TRICKEY, and )
WILLIAM WEBSTER, )
Attorney General, )
State of Missouri, )
)
Respondents. )

## MEMORANDUM AND ORDER

This matter is before the Court on petitioner's motion for a certificate of probable cause and request to proceed in forma pauperis on appeal.

By order dated November 22, 1988, this Court dismissed the petition of Terry D. McIntyre for writ of habeas corpus. And, by order dated September 18, 1989, this Court denied petitioner's motion to alter or amend the order of November 22, 1988.

In order to obtain a certificate of probable cause petitioner "'must demonstrate that the

issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."' Gordon v. Willis, 516 F.Supp. 911, 913 (N.D.Ga. 1980) (quoting United States ex rel. Jones v. Richmond, 245 F.2d 234 (2d Cir.), cert. denied, 355 U.S. 846 (1957)." Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983). After reviewing petitioner's writ of habeas corpus and his motion to alter or amend the Court concludes that reasonable jurists could not differ on the conclusion that the evidence submitted at petitioner's trial in the Circuit Court of the City of St. Louis for automobile tampering was insufficient to convict him of automobile theft and thus the trial in the Circuit Court of St. Louis County for stealing a motor vehicle was not double jeopardy. Accordingly, the Court will deny petitioner's motion for a certificate of probable cause.

Because it appears that petitioner is indigent, however, the Court will grant petitioner's motion to proceed on appeal in forma pauperis.

Accordingly,

IT IS HEREBY ORDERED that petitioner's motion for a certificate of probable cause is DENIED.

IT IS FURTHER ORDERED that petitioner's request to proceed in forma pauperis on appeal is GRANTED.

Dated this 17th day of October, 1989.

--Edward L. Filippine--
UNITED STATES DISTRICT JUDGE

## United States Court of Appeals
## For the Eighth Circuit

No. 89-2700EM

| | |
|---|---|
| Terry D. McIntyre,<br>Appellant,<br>v.<br>Myrna Trickey,<br>Appellee. | Appeal from the United States District Court for the Eastern District of Missouri |

This appeal from the United States District Court for the Eastern District of Missouri comes before the Court on consideration of an application for certificate of probable cause to appeal. In connection with the application, the Court has carefully examined the file of the District Court in case number 88-1708 C(2). Being fully advised in the premises, it is ordered by the Court that the application for certificate of probable cause be granted.

It is further ordered that the Clerk of this Court is directed to appoint John Davidson of St. Louis, Missouri, to represent the

appellant herein under the terms of the Criminal Justice Act.

May 7, 1990

Ordered entered at the direction of the Court

-- Robert D. St.Vrain--

Clerk, U.S. Court of Appeals, 8th Circuit.

**STATE of Missouri, Respondent,**

**v.**

**Terry D. McINTYRE, Appellant.**

**No. 51914.**

Missouri Court of Appeals,
Eastern District,
Division One.

June 30, 1987.

Motion for Rehearing and/or Transfer
Denied Aug. 6, 1987.

Application to Transfer Denied
Sept. 15, 1987.

SATZ, Presiding Judge.

Defendant Terry D. McIntyre was convicted by a jury of tampering in the first degree, § 569.080, RSMo. 1986, and was sentenced as a persistent offender to ten years imprisonment. Defendant appeals. We affirm.

On November 22, 1985, defendant went to Kirkwood Mitsubishi and asked to test drive a Mitsubishi Galant. Defendant was left alone in the showroom for approximately two minutes while the salesman went to get the keys to the Galant.

During this time, defendant was looking at the interior of a car on the showroom floor. This car had its keys in its ignition, and those keys were similar to the keys to the Galant.

After defendant test drove the Galant, he gave the salesman a set of Mitsubishi keys. The salesman placed the keys on a board where they were normally kept. Shortly thereafter, the salesman discovered the Galant was missing and also discovered the keys on the board were to the showroom car defendant had been looking at, not the Galant. The salesman reported the missing Galant to the Kirkwood police.

Two days later, police saw defendant driving the Galant, which was listed on a "hot sheet" of stolen cars. After chasing the car for approximately eight blocks, police stopped the car and arrested defendant. Defendant testified at trial he had borrowed the car from a friend.

Defendant makes two arguments on appeal. Neither has merit. First, defendant argues it

was error to allow the introduction of evidence showing defendant may have stolen the Galant. Defendant argues the prejudicial effect of this evidence outweighed its probative value. We disagree.

Generally, evidence of other crimes is inadmissible unless it has some legitimate tendency to establish defendant is guilty of the crime charged. *State v. Shaw*, 636 S.W.2d 667, 672 (Mo. banc 1982). Thus, this evidence may be admissible when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity. *State v. Trimble*, 638 S.W.2d 726, 732 (Mo. banc 1982); *State v. Caldwell*, 695 S.W.2d 484, 486 (Mo.App.1985).

As an element of its case, the State was required to prove defendant knew he was operating the car without the consent of the owner. The evidence linking defendant with the theft of the car tended to establish this knowledge on the part of defendant and thus was relevant.

*See, e.g. State v. Remspecher*, 542 S.W.2d 24, 25 (Mo.App.1976). The key question is whether the relevancy of this evidence is outweighed by its possible prejudicial effect. *Caldwell, supra* at 484. The decision whether the potentially prejudicial effect of evidence outweighs its probative value is within the sound discretion of the trial court. *Shaw, supra* at 672. The trial court here properly exercised its discretion in admitting the evidence.

Defendant also argues the trial court erred in rejecting his proffered instruction on the use of prior convictions to impeach his testimony. The 3.00 series of MAI-CR2d has two instructions relating to the use of prior convictions for impeachment: 3.56 entitled "Impeachment of a Witness Other Than Defendant by Prior Offenses" and 3.58 entitled "Impeachment of Defendant by Conviction of 'Unrelated Crimes' Shown Soley for the Purpose of Impeachment". Defendant requested the trial court use MAI-CR2d 3.56 to instruct the jury on the prosecutor's

use of prior convictions to impeach defendant's testimony. The trial court properly refused to do so.

The proper instruction to be given when the defendant's testimony has been impeached with prior convictions is MAI-CR2d 3.58. MAI-CR2d 3.58 Notes on Use, note g; *State v. Williams*, 632 S.W.2d 266 (Mo.App.1982). Whenever there is an MAI-CR instruction applicable under the law to the facts, the MAI-CR instruction must be given to the exclusion of any other on the same subject. Rule 28.02(c); *State v. Morris*, 639 S.W.2d 239, 240-241 (Mo.App.1982). Defendant argues he would be prejudiced by the use of MAI-CR2d 3.58 over MAI-CR2d 3.56, because MAI-CR2d 3.58 explicitly lists the prior offenses used to impeach. This argument has been made and rejected. *Williams, supra* at 266. If the prior convictions have already been elicited on cross-examination, we do not see how defendant can be prejudiced by a reference to them in an instruction.

Moreover, instructions in the 3.00 series of MAI-CR2d are required to be given only if requested. Rule 28.02(a). Defendant did not request instruction MAI-CR2d 3.58. According to the prosecutor's statement on the record, the trial court offered to give MAI-CR2d 3.58 and the defendant refused this offer. The trial court agreed with the prosecutor's characterization of the events at the instruction conference. If defendant refused MAI-CR2d 3.58, the trial court was under no obligation to substitute an alternative instruction. *Williams, supra* at 266. *See also Morris, supra* at 241.

Judgment affirmed.

CRIST and KELLY, JJ., concur.

**STATE of Missouri,**
**Plaintiff-Respondent,**

**v.**

**Terry D. McINTYRE,**
**Defendant-Appellant.**

**No. 53084.**

Missouri Court of Appeals,
Eastern District,
Division One.

Feb. 16, 1988.

Application to Transfer Denied
May 17, 1988.

REINHARD, Judge.

Defendant was found guilty by a jury of stealing a motor vehicle and sentenced by the court as a persistent offender to a term of 10 years' imprisonment to be served consecutively to an existing 10-year sentence. He appeals; we affirm.

On November 22, 1985, a man who identified himself as "Johnny" went to Kirkwood Mitsubishi and told salesman Steven George he wanted to test drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator,

"Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the keys to the demonstrator Galant.

After a test drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About 15 minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys on the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis city police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photos, obtained from the St. Louis Police Department, were of

defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George, and asked him if any of the photos were of the person who was in the dealership and took a ride in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first degree tampering for operating the Galant in the city of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to 10 years' imprisonment. We affirmed his tampering conviction on appeal. *State v. McIntyre*, 735 S.W.2d 111 (Mo.App.1987).

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi.

His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also identified defendant in court as "Johnny," the person who test drove the Galant that later was stolen. Defendant also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the date of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant-on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

On appeal, defendant contends the trial court erred in failing to sustain his motion to dismiss "on grounds of prior jeopardy in that

[defendant] had already been previously tried and convicted of unlawfully operating the vehicle he was charged in this case with stealing."

Defendant relies primarily on *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). We believe *Brown* supports the result we have reached. In *Brown,* the defendant was arrested on December 8, 1973, while driving a stolen car. He was charged with "joyriding," pled guilty, and served a 30-day jail sentence. After his release from jail, he was charged with the November 29, 1973, theft of the automobile. The trial court overruled his double jeopardy objection and the Ohio Court of Appeals affirmed. In its opinion, the Ohio appellate court stated its conclusion that, under Ohio law, the misdemeanor of joyriding was included in the felony of auto theft; however, it held the second prosecution permissible because the theft occurred on November 29 and the joyriding on December 8. *Brown,* 432 U.S. at 162-64, 97 S.Ct. at 2223-24, 53 L.Ed.2d at 192-93. Relying

on the Ohio Court of Appeals's interpretation of the Ohio statutes, the United States Supreme Court reversed the conviction on double jeopardy grounds. *Id*. at 168-70, 97 S.Ct. at 2226-27, 53 L.Ed.2d at 195-97.

Here, defendant asks us to overrule a long line of Missouri opinions that hold that tampering with a motor vehicle is not a lesser included offense of stealing the same vehicle. In his brief, defendant states as follows:

> The Ohio Court of Appeals had earlier held that the crime of joyriding was included in the offense of auto theft. Missouri courts have developed a different interpretation, holding that joyriding or "tampering" is *not* a lesser included offense of auto theft. This is contrary to the definitions of the respective offenses and the meaning of "lesser included offense."
>
> . . . .
>
> The statutes involved in the *Brown* case are virtually identical to the Missouri Statutes for tampering and stealing a motor vehicle. (Citations omitted.)

We recognize that our courts have interpreted the Missouri stealing and tampering

statutes differently from the Ohio court's interpretation of Ohio law. In *Brown*, however, the United States Supreme Court recognizes that state courts "have the final authority to interpret . . . that State's legislation," and the Court's ruling was based on the Ohio court's determination that, under Ohio law, joyriding is a lesser included offense of auto theft. The Missouri Court of Appeals, Western District, faced this issue in *State v. Smith*, 655 S.W.2d 626 (Mo.App.1983), and concluded that auto tampering is not a lesser included offense of auto theft. We have consistently followed the western district's view.[1] *Smith* and our opinions that follow it were published subsequent to *Brown*, and we see no reason to deviate from this precedent.

---

[1] *See State v. Rivers*, 663 S.W.2d 255 (Mo.App.1983); *State v. Gobble*, 675 S.W.2d 944 (Mo.App.1984); *State v. Souders*, 703 S.W.2d 909 (Mo.App.1985). Our supreme court denied applications to transfer in *Smith*, *Rivers*, and *Gobble*.

We recognize, as did Justice Blackmun in his dissenting opinion in *Brown*, that the appropriation and operation of an automobile could be "so closely connected in time" that they would constitute only one offense. *Brown*, 432 U.S. at 171, 97 S.Ct. at 2228, 53 L.Ed.2d at 198. Here, however, the tampering was not a part of the stealing that occurred two days earlier. Had defendant been charged with stealing and tampering based solely on his driving the Galant from the dealership parking lot, then we believe his conduct would constitute only one offense.[2]

Defendant also alleges the trial court erred in failing to sustain his motion to suppress identification of his photograph by

---

[2] We note that defendant, at his trial on the tampering charge, objected to evidence that he stole the Galant, seeking to exclude it as evidence of another crime. In ruling on this complaint, we treated the stealing as a separate offense from the tampering. *McIntyre*, 735 S.W.2d at 112.

automobile salesman George and George's in-court identification. He argues that, because none of the four other photographs showed a man with a similar hair style, the circumstances were "inherently suggestive and conducive to mistaken identification."

We have carefully reviewed the record and conclude that, based on the totality of the circumstances, Detective Schneedle was not impermissibly suggestive in his conduct of the photo identification session with George. *See State v. Higgins*, 592 S.W.2d 151, 159-60 (Mo. banc 1979), *appeal dismissed*, 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254 (1980). Moreover, George's in-court identification of defendant was reliable under the totality of the circumstances test of *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *See Higgins*, 592 S.W.2d at 160.

Judgment affirmed.

GARY R. GAERTNER, P.J., and CRIST, J., concur.

AMENDED 9/4/91

## United States Court of Appeals
## For the Eighth Circuit

No. 89-2700EMSL

Terry D. McIntyre, )
)
Appellant, )
)
vs. ) Order Denying Petition for
) Rehearing and Suggestion
Myrna Trickey, ) for Rehearing En Banc
)
Appellee. )

Appellee's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

August 30, 1991

Order Entered at the Direction of the Court:

--Michael E. Gans--

Clerk, U.S. Court of Appeals, Eighth Circuit

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY[1]

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI ____________ DIVISION

| | |
|---|---|
| Name: Terry McIntyre | Prisoner No. 44126<br>Case No. 88-1708-C-2 |

Place of Confinement: Missouri Eastern Correctional Center

| | | |
|---|---|---|
| Name of Petitioner | | Name of Respondent |
| Terry D. McIntyre | v. | **Myrna Trickey** |

The Attorney General of the State of:
William L. Webster

PETITION

1. Name the location of court which entered the judgment of conviction under attack: St. Louis City Circuit Court, St. Louis County Circuit Court.

2. Date of judgment of conviction: June 5, 1986, May 1987

3. Length of sentence: Consecutive Sentences of 10 years and 10 years.

4. Nature of offense involved (all counts): St. Louis city, Tampering First Degree, St. Louis County, Stealing an Auto, both

---

[1] Respondent filed his petition on a model form. Questions from the form are in ordinary type. Respondent's answers and the unanswered questions on the form are shown with an underline.

convictions resulting from the same offense.

5. What was your plea? (Check one)

(a) Not guilty [X]
(b) Guilty [_]
(c) Nolo Contendere [_]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: ________

6. Kind of trial: (Check one)

(a) Jury [X]
(b) Judge only [_]

7. Did you testify at the trial?

Yes [X] No. [_]

8. Did you appeal from the judgment of conviction?

Yes [X] No. [_]

9. If you did appeal, answer the following:

(a) Name of court: Missouri Court of Appeals, Eastern District.
(b) Result: Affirmed.
(c) Date of result: Feb. 16,1988, 744 S.W.2d 894, (Mo. app.1988)
(d) Grounds raised: Double Jeopardy
(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

    (1) Name of court: Missouri Supreme Court
    (2) Result: Application to Transfer, Denied

(3) Date of result and citation, if known: May 17,1988
(4) Grounds raised: Double Jeopardy

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: Not Applied
(2) Result: ______________________
(3) Date of result and citation, if known: ______________________
(4) Grounds raised: ______________________

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment in any court, state or federal?

Yes [X] No. [_]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: St. Louis County Circuit Court
(2) Nature of proceeding: 29.15 Motion, Post-Conviction Relief
(3) Grounds raised: Ineffective Assistance Of Counsel
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]
(5) Result: Pending Disposition
(6) Date of result: ______________

(b) As to any second petition, application or motion[,] give the same information:

(1) Name of court: ________________

(2) Nature of proceeding: __________

(3) Grounds raised: ________________

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No. ☐

(5) Result: ________________________

(6) Date of result: ________________

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.
Yes ☐ No. ☐

(2) Second petition, etc.
Yes ☐ No. ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: ________________________________

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for

relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to his conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: SEE ATTCHED

Supporting FACTS (tell your story *briefly* without citing cases or law): SEE ATTCHD

Attached Information to A, Ground One.

A. Ground One. The State of Missouri violated petitioners rights under the double jeopardy clause, of the 5th Amendment, in that: The evidence used by the State of Missouri in prosecuting the first offense, Tampering First Degree, was also used to sustain a conviction in the second offense, Stealing a Motor Vehicle, in violation of Brown vs.O hio, 432 U.S. 161, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977).

The principle question in this case is whether Auto Theft and Tampering First Degree, constitute the"SameO ffense" under the Double Jeopardy Clause. In Re Nielsen,131 U S '176, 9 S. Ct. 672, 33 L.Ed.118 (1889).

Supporting Facts: On December 19,1985, petitioner was charged with first degree tampering for operating a stolen motor vehicle; and he was subsequently found guilty by a jury on June 5,1986. Thereafter, on August 9, 1986, petitioner was again charged with stealing the same motor vehicle based on his alleged appropriation of it from the dealership. The evidence relied on by the State to convict petitioner at his first trail for first degree tampering was the exact same evidence - relied on by the State to convict petitioner at his subsequent trail for stealing the same motor vehicle. The State also used the same - witnesses at the first and second trail. It is without question that the evidence required to warrant a conviction upon

petitioner's first - prosecution would have been sufficient to support his conviction upon the subsequent prosecution for stealing the same motor vehicle that he had earlier been convicted of for first degree tampering for operating the same motor vehicle.
Petitioner maintains that the City of St. Louis and St. Louis County prosecutions must be viewed as the acts of a single sovereign under the double jeopardy clause.

Conclusion: For This reason, the Court should grant the petition for writ of Habeas Corpus to establish and clarify the standards by which the Missouri Courts interpret a clear violation of the fifth(5th) and fourteenth (14th) Amendments to the United States Constitution.

Respectfully,

--Terry D. McIntyre--
Terry McIntyre Petitioner

B. Ground two: ______________________

Supporting FACTS (state *briefly* without citing cases or law): ______________

C. Ground three: ______________________

Supporting FACTS (state *briefly* without citing cases or law): ______________

D. Ground four: ______________________

Supporting FACTS (state *briefly* without citing cases or law): ______________

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting

them: ____________________

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

    Yes [X]  No. [_]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

    (a) At preliminary hearing: Mr. Paul Madison, No. 35261, St. Louis County Public Defenders Office.

    (b) At arraignment and plea: __________

    (c) At trial: Same

    (d) At sentencing: Same

    (e) On appeal: Same

    (f) In any post-conviction proceeding: ____________________

    (g) On appeal from any adverse ruling in a post-conviction proceeding: ______

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

    Yes [_]  No. [X]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

    Yes [_]  No. [X]

(a) Of so, give name and location of court which imposed sentence to be served in the future: ______________

(b) Give date and length of the above sentence: ______________

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [_] No. [_]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in his proceeding.

______________
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on
8/5/88
(date)

--Terry D. McIntyre--
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY D. MCINTYRE, )
)
Petitioner, )
)
v. ) No. 88-1708C(2)
)
MYRNA TRICKEY, )
)
Respondent. )

## MOTION TO ALTER OR AMEND JUDGMENT

Comes now petitioner, Terry D. McIntyre, pro se, and pursuant to Fed.R.Civ.P. 59(e), and would respectfully move the Court to alter or amend its judgment entered in the above-entitled cause and for his cause of action states as follows.

1. That, on November 22, 1988, the Court sustained and adopted the Report and Recommendation of the United States Magistrate and dismissed petitioner's petition for a writ of habeas corpus in the above-entitled cause.

2. That this pro se motion to alter or amend the Court's judgment in the above-entitled

cause is served not later than 10 days after entry of the judgment and is timely filed.

3. That the petitioner would respectfully reiterate to the Court that the findings of the United States Magistrate, which the court has sustained and adopted, have totally, either through inadvertence or oversight, misconstrued petitioner's double jeopardy argument advanced in his petition for a writ of habeas corpus.

4. The U.S. Magistrate stated that the "/p/etitioner contends that the tampering and stealing a motor vehicle offense constitute the same offense." (U.S. Magistrate's Report and Recommendation, p. 2) (emphasis added). The Magistrate went on to conclude that "/u/nder Missouri law, tampering with a motor vehicle is not a lesser-included offense of stealing the same vehicle." Id. at 3. In addition to these findings, the U.S. Magistrate noted that "the Missouri Court of Appeals found that 'the tampering was not a part of the stealing that had occurred two days earlier' for which petitioner

was subsequently convicted and sentenced in the Circuit Court of the City of St. Louis." Ibid.

5. These findings by the U.S. Magistrate totally overlook that it is not a question as to whether the tampering and stealing a motor vehicle offense constitute the "same offense" under Missouri law, but whether these offense constitute the the "same offense" for double jeopardy purposes is the question to be answered. Cf. Jordan v. Com. of Va., 653 F.2d 870 (4th Cir. 1980). In the instant case, as was the case in Jordan, the evidence necessarily used by the State in prosecuting the earlier first-degree tampering charge would totally have sufficed to sustain the later stealing a motor vehicle charge. Thus, the evidence required to warrant a conviction upon the first-degree tampering charge would have been sufficient to support a conviction upon the stealing a motor vehicle charge. Therefore, under the standard enunciated by the United States Supreme Court in In re Nielsen, 131 U.S. 176, 188, 9 S.Ct. 672, 33 LEd.

118 (1889), the second prosecution was barred because the "same evidence" would have sufficed to gain a conviction on either charge.

6. Petitioner would respectfully submit to the Court that the "actual-evidence" test employed and relied on in In re Nielsen, supra, rather than the "same offense" test employed in Brown v. Ohio, 432 U.S. 161 (1977) and relied on by the U.S. Magistrate and this Court, should have been used to decide petitioner's double jeopardy claim in the instant case. See also Illinois v. Vitale, 447 U.S. 410, 419-21, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980).

7. In the instant case, the Court should examine the actual evidence presented at both of petitioner's trials in the State courts. Had the Court examined petitioner's double jeopardy claim in this posture, under In re Nielsen, supra, the Court's conclusion may have been different.

WHEREFORE, for the reasons so stated herein, petitioner prays that the Court alter or

amend its judgment entered in the above-entitled cause and grant such other and further relief it deems just and proper in the premises.

Dated this 30th day of November, 1988.

Respectfully submitted,

--Terry D. McIntyre--
Terry D. McIntyre
Reg. No. 44126
MECC, 1B-16
18701 Old Highway 66
Pacific, Mo 63069

*pro se*

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 30th day of Nov., 1988, to:

Stephen D. Hawke
Asst. Attorney General
P. O. Box 899
Jefferson City, MO 65102

--Terry D. McIntyre--
TERRY D. McINTYRE

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

③

No. 91-900

# IN THE
# SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1991

PAUL CASPARI and WILLIAM L. WEBSTER

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHRISTOPHER J. HOLTHAUS
1510 Chemical Building
721 Olive Street
St. Louis, Missouri 63101
(314) 231-0055

*Attorney for Respondent*

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether Mr. McIntyre's conviction for stealing an automobile subsequent to a conviction for tampering with the same automobile violated his right not to be twice prosecuted for the same offense under *Brown v. Ohio*.

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Certiorari should be denied because the Eighth Circuit properly ruled that Respondent's conviction for stealing an automobile for which he had previously been convicted of tampering was double jeopardy under *Brown v. Ohio* and thus no new rule was necessary. . . . . . . . . . . . . . . . . . 5

The double jeopardy clause prohibits a second trial for conduct where the State used the same evidence at both trials proving the same conduct. . . . . . . . . 6

Regardless of the construction of the double jeopardy clause of the Fifth Amendment in *Grady v. Corbin*, Respondent would still have been the victim of a violation of the double jeopardy clause. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7

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Respondent Terry D. McIntyre respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit granting respondent's application for writ of *habeas corpus*.

◆

## STATEMENT OF THE CASE

### A. Background

On November 22, 1985 Terry McIntyre took a car belonging to a car dealer. On November 24, he was arrested in the adjacent county while driving the stolen car. He was found guilty in June 1986 after a jury trial on the charge of "tampering" with the vehicle. In August 1986, he was charged with stealing the same car for which he had been convicted of tampering. He was found guilty of stealing the car in February, 1987. He is now serving consecutive prison terms of ten years each, totaling twenty years, for stealing and tampering with the car.[1]

---

[1] The Missouri tampering statute provides:

> A person commits the crime of tampering in the first degree if.... He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile without consent of the owner thereof.

§569.080, Mo. Rev. Stat. The Missouri statute for stealing provides:

> A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion...

The jury instructions for tampering in this case were:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on November 24, 1985, . . . the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi; and
>
> Second, that he operated the automobile without the consent of the owner, and
>
> Third, that he operated knowing that he did so without the consent of the owner,
>
> then you will find the defendant guilty of tampering in the first degree.

The jury instructions in the subsequent stealing case were:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First that on November 22, 1985 . . . the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and
>
> Second, the defendant did so without the consent of Kirkwood Mitsubishi, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,
>
> then you will find the defendant guilty of felony stealing.

---

> Stealing is a class C felony if: The property appropriated consists of: Any motor vehicle, watercraft or aircraft;

§570.030, Mo. Rev. Stat.

## B. Proceedings Below

Mr. McIntyre was sentenced for tampering. The Missouri Court of Appeals affirmed the conviction on June 30, 1987, *State v. McIntyre*, 735 S.W.2d 111 (Mo. Ct. App. 1987). He was later charged convicted and sentenced for stealing the car. The conviction was affirmed on February 16, 1988, *State v. McIntyre*, 749 S.W.2d 420 (Mo. Ct. App. 1988). McIntyre then filed a motion for habeas corpus relief on September 2, 1988 in the U.S. District Court for the Eastern District of Missouri. A certificate of probable cause was denied in the district court on October 17, 1989. On May 7, 1990 the Court of Appeals for the Eighth Circuit granted a certificate of probable cause and counsel was appointed. On July 15, 1991 the United States Court of Appeals for the Eighth Circuit issued its opinion granting the writ of *habeas corpus*. Rehearing was denied on September 4, 1991. The State then filed its Petition for Certiorari.

◆

## REASONS FOR DENYING THE WRIT

Whether the test of *Blockburger v. United States*, 234 U.S. 299 (1932) or the "same evidence" test of *Grady v. Corbin*, 110 S.Ct. 2084 (1990), is used, the result would be the same. Retroactivity of *Grady* pursuant to *Teague v. Lane*, 109 S.Ct. 1060 (1989), is not necessarily at issue.

McIntyre wins under the test of *Blockburger v. United States*, 234 U.S. 299 (1932) as applied in *Brown v. Ohio*, 432 U.S. 161 (1977). The State used the same evidence at the first trial that it used at the second trial. It proved that McIntyre had the car, and used the testimony of the owner that he had stolen it to get a conviction for tampering. With that conviction in hand, the prosecutor in the next county prosecuted for the theft using the same evidence. Not some of the same evidence, as in *Dowling v. United States*, 493 U.S. 342 (1990), but all of the evidence!

The highest court of Missouri has not determined whether tampering is a lesser included offense of stealing. The Missouri Court of Appeals has distinguished *Brown v. Ohio*, 432 U.S. 161 (1977) at 170 on the basis that *Brown* held that the determination whether the Constitution's double jeopardy rule has been violated is a matter for state determination. *State v. Smith*, 655 S.W.2d 626 (Mo.Ct.App. 1983); *State v. McIntyre*, 749 S.W.2d 420 (Mo.App. 1988). The Missouri Court of Appeals has simply decided to disagree with the Ohio Court of Appeals and says, ignoring the language in *Brown* prohibiting the division of a single crime into a series of temporal or spatial units, that tampering and stealing are separate crimes. The Missouri Supreme Court has not ruled on the double jeopardy aspects of the tampering and stealing convictions in consecutive prosecutions.

The State admitted in its petition for *certiorari* that it tried both cases on the same evidence (P27). The jury instructions for both cases were similar, except that the stealing conviction required the additional

element of intent to permanently deprive the owner of the vehicle.[2] The car was stolen within two days of the joyride.

The right not to be subject to two trials for the same offense is a fundamental right under *Teague v. Lane*, 109 S.Ct. 1060 (1989). This right was defined in *Robinson v. Neil*, 409 U.S. 505, 510 (1973). The Eighth Circuit did not have to find that *Grady v. Corbin* was retroactive in application, since both *Brown* and *Blockburger* compelled its decision. However, the Eighth Circuit was correct in determining that Grady v. Corbin should be retroactive, since the double jeopardy rule deprives the government of the power to punish again in a separate trial for behavior that has already been punished. The result, a finding of double jeopardy, would be the same under *Grady*, *Brown*, *Blockburger* or *ex parte Nielsen*, 131 U.S. 176 (1889).

There is no issue worthy of Constitutional review.

## I.

## Certiorari should be denied because the Eighth Circuit properly ruled that Respondent's conviction for stealing an automobile for which he had previously been convicted of tampering was double jeopardy under *Brown v. Ohio* and thus no new rule was necessary.

Respondent has been tried twice and is to serve two consecutive ten year terms in prison for tampering with and then stealing the same automobile from a dealer. Serious equal protection problems arise if the convictions in Missouri were to be upheld, while an identical case in Ohio would be violative of double jeopardy. The highest court in

---

[2] It is counsel's understanding that the tampering statutes were adopted because the mobility of the automobile made it difficult to prove an intent to permanently deprive the owner of the vehicle.

Missouri has not ruled whether tampering is a lesser included offense of stealing, so this Court is not bound to accept its rulings on this substantive matter. However, this Court is not bound by a state court's interpretation of the Constitution. The Missouri Court of Appeals has simply held that it is not bound by *Brown v. Ohio*. *State v. McIntyre*, 749 S.W.2d 420, 422 n.1 (Mo. Ct. App. 1988)

## II.

**The double jeopardy clause prohibits a second trial for conduct where the State used the same evidence at both trials proving the same conduct.**

Petitioner fails to consider the holding of *Brown v. Ohio*, 432 U.S. 161 (1977) in its second point. Justice Scalia dissenting in *Grady v. Corbin*, 110 S.Ct. 2084, at 2101 stated that "We held that *Blockburger* barred the second prosecution [in Brown]: because joyriding was simply a lesser included offense of auto theft, proof of the latter would 'invariably' require proof of the former."[3] Petitioner spends much time arguing that it could have proven the stealing with other evidence, but it did not, and cannot explain how it could have done so. Respondent was tried twice on the same evidence, the same facts, and the same conduct.

Examination of the statutes establishes that the only additional element to be proven in stealing is the intent to permanently deprive the owner. There is no element in the tampering statute to be proven

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[3] Petitioner ignores this in its discussion on pages 30 though 34 of its Petition.

that is not taken care of in the stealing statute. Thus the test of *Blockburger v. United States*, 234 U.S. 299, 304 (1932) is met: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

This Court has amply decided the proper use of "other crimes" evidence in *Dowling*. This case is not the one to determine that evidence of this crime should not be used as evidence in a subsequent trial for the same crime.

## III.

## Regardless of the construction of the double jeopardy clause of the Fifth Amendment in *Grady v. Corbin*, Respondent would still have been the victim of a violation of the double jeopardy clause.

*Grady v. Corbin*, 110 S.Ct. 2084 (1990) was ruled as it was because the test of *Blockburger v. United States*, 234 U.S. 299 (1932) was considered to be inadequate in certain situations. *Grady* builds upon and does not replace *Grady*. The precedent of *Brown v. Ohio*, 432 U.S. 161 (1977) remains viable and absolutely controls this case.

In *Dowling v. United States*, 493 U.S. 342 (1990), the Government used the testimony of a person who had observed the defendant in a similar context and who had testified against him in another prosecution for a robbery at another time and place in a trial for bank robbery. In this case, the State admittedly used all the evidence from one prosecution to get another conviction involving the

same victim, same car, same defendant, and same taking. Reliance on *Dowling* is inappropriate. Nothing would be gained by attempting to use this case to explicate *Dowling*.

Petitioner attempts to excite the Court with threats that multiple jurisdictional prosecutions could be shut down if *Grady* is allowed to stand. *Brown v. Ohio*, 432 U.S. 161 (1977) dealt with cross jurisdictional prosecutions, and decided that this was no justification for the violation of the double jeopardy guarantee.[4] The problem has been addressed satisfactorily, see *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990)

◆

## CONCLUSION

Respondent respectfully requests this Court to deny a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Christopher J. Holthaus
Attorney for Respondent
Appointed pursuant to the Criminal Justice Act
1510 Chemical Building
Saint Louis, Missouri 63101
(314)231-0055
Fax: (314)231-1925

---

[4] Does driving the vehicle one stole constitute a crime spree?